

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 741.

THE UNITED STATES

vs.

BESSIE WILDCAT, A MINOR, ET AL.

ON A CERTIFICATE FROM AND WRIT OF HABEAS CORPUS TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT.

CERTIFICATE FILED OCTOBER 22, 1918.

WRIT OF HABEAS CORPUS GRANTED JANUARY 2, 1919.

(25,571)

(25,571)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 741.

THE UNITED STATES

vs.

BESSIE WILDCAT, A MINOR, ET AL.

ON A CERTIFICATE FROM AND WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT.

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a Original.

TRANSCRIPT OF RECORD.

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 4624.

UNITED STATES OF AMERICA, Appellant,

vs.

BESSIE WILDCAT, a Minor; SANTA WATSON, as Guardian of Bessie Wildcat, a Minor; Cinda Lowe, Louisa Fife, Annie Wildcat, Emma West, Martha Jackson, a Minor; Saber Jackson, as Guardian and Next Friend of Martha Jackson, a Minor; J. Coody Johnson, Aggie Marshall, Phillip Marshall, H. B. Beeler, Max H. Cohn, Black Panther Oil & Gas Company, a Corporation; Jack Gouge, Ernest Gouge, Mattie Bruner, Formerly Mattie Phillips; Jennie Phillips, Billie Phillips, D. L. Berryhill, William McCombs, Barney Unussee, Barnossee Unussee, Johnathan R. Posey, Charles F. Bissett, Taxaway Oil Company, a Corporation; F. L. Moore, J. S. Cosden, Fulhochee Barney, Siah Barney, Tommy Barney, Mollie Barney, Toney Chupko, Joseph Chupko, James C. Chupko, Eddie Larney, Polly Yargee, Sarkarye Chupko, Dick Larney, Moser Chupko, Tommy Chupko, Linda Harjo, Mary Jones, Loley Cooper, Celia Yahola, Charles S. Smith, Nora Watson, a Minor; John Smith, Lewis Smith, Lawrence Smith, Guy Smith, Ella Looney, née Smith; Edna Pike, née Smith; Pearle Smith Willis Smith, a Minor; J. S. Tilly, Guardian of Willis Smith, a Minor; Rannie Smith, Elizabeth Rhyne, née Smith; Rashie C. Smith, Montie Nunn, née Smith; Lou Smith, Howard Weber, Saber Jackson, Martha Simmons, Hannah Bullette, Robert Owen Burton, Nathaniel Mack Burton, Lydia Belle Wilson, née Burton; Samuel L. Burton, Abi L. Miller, née Burton; Minnie Ola Edwards, née Burton; Mary Eliza Burton, J. W. McNeal, L. W. Baxter, and Dave Knight, Appellees.

Appeal from the United States District Court for the Eastern District of Oklahoma.

Filed Dec. 21, 1915. John D. Jordan, Clerk.

b Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1916, of said Court, Before the Honorable William C. Hook and the Honorable Walter I. Smith, Circuit Judges, and the Honorable Charles F. Amidon, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit; on the twenty-first day of December, A. D. 1916, a transcript of record, pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Oklahoma, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein the United States of America is Appellant, and Bessie Wildcat, a Minor, et al., are Appellees, which said transcript as prepared, printed and certified by the Clerk of said District Court in pursuance of an Act of Congress approved February 13, 1911, is in the words and figures following, to-wit:

1 In the United States District Court for the Eastern District of Oklahoma.

Pleas and proceedings before the Honorable Ralph E. Campbell, Judge of the District Court of the United States for the Eastern District of Oklahoma, presiding in the following entitled cause:

In Equity. No. 2017.

UNITED STATES OF AMERICA, Complainant,

vs.

BESSIE WILDCAT et al., Defendants.

In the United States District Court for the Eastern District of Oklahoma.

No. 2017-E.

THE UNITED STATES OF AMERICA, Complainant,

v.

BESSIE WILDCAT, a Minor; SANTA WATSON, as Guardian of Bessie Wildcat, a Minor; Cinda Lowe, Louisa Fife, Annie Wildcat, Emma West, Martha Jackson, a Minor; Saver Jackson, as Guardian and Next Friend of Martha Jackson, a Minor; J. Coody Johnson, Aggie Marshall, Phillip Marshall, H. B. Beeler, Max H. Cohn, Black Panther Oil & Gas Company, a Corporation; Jack Gouge, Ernest Gouge, Mattie Bruner (formerly Mattie Phillips); Jennie Phillips, Billie Phillips, D. L. Berryhill, William McCombs, and Barnossee Unussee, Defendants.

Amended Bill of Complaint.

The United States of America, by D. H. Linebaugh, United States Attorney for the Eastern District of Oklahoma, by direction of the Honorable James C. McReynolds, Attorney General of the United States, and by leave of this honorable court first had, brings this amended bill against Bessie Wildcat, a minor, Santa Watson as

guardian of Bessie Wildcat, a minor, Cinda Lowe, Louisa Fife, Annie Wildcat, Emma West, Martha Jackson, a minor, Saber Jackson as guardian and next friend of Martha Jackson, a minor, J. Coody Johnson, Aggie Marshall, Phillip Marshall, H. B. Beeler, Max H. Cohn, Jack Gouge, Ernest Gouge, Mattie Bruner (formerly Mattie Phillips), Jennie Phillips, Billie Phillips, D. L. Berryhill, William McCombs and Barnossee Unussee, each of the said defendants being a citizen and resident of the State of Oklahoma, and of the Eastern Judicial District thereof, and being within the jurisdiction of this court; and against the defendant Black Panther Oil & Gas Company, which is a corporation organized and existing under and by virtue of the laws of the State of Oklahoma, and is a citizen and inhabitant of the said state, and of the Eastern Judicial District thereof; and thereupon your orator complains and says:

I.

That the said defendants Bessie Wildcat, a minor, Cinda Lowe, Louisa Fife, Annie Wildcat, Emma West, Martha Jackson, a minor, Aggie Marshall, Phillip Marshall, Jack Gouge, Ernest Gouge, Mattie Bruner, nee Phillips, Jennie Phillips, Billie Phillips, D. L. Berryhill, William McCombs and Barnossee Unussee, all and singular, claim to be, and your orator is informed and believes, and therefore avers the fact to be, that they are, the sole heirs at law of Barney Thlocco, deceased (hereinafter more particularly referred to), and all and singular they claim whatever right, title or interest they claim to have in and to the land hereinafter described by virtue of being heirs at law of the said Barney Thlocco, Deceased.

II.

Your orator further shows that for more than seventy years past that portion of the territory belonging to the United States known and designated as the Indian Territory and now forming a part of the State of Oklahoma and within the Eastern Judicial District thereof, has been occupied by the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes or Nation of Indians. That said above named tribes of Indians formed and constituted a particular and distinct class of Indians, known and designated as the Five Civilized Tribes, as distinguished from other Indians or Indian tribes within the jurisdiction of the United States and under its care, protection and control. That in many of the laws passed by the Congress of the United States pertaining to said Five Tribes of Indians and to their property they are referred to and designated as the Five Civilized Tribes of Indians, and that wherever so designated or referred to, in any of the Acts of Congress, were and are included within the provisions of such acts in the same manner and with like force and effect as though each of said Five Tribes were particularly and separately designated and named therein. That during all of the times mentioned herein the Creek Tribe of

Indians has maintained and still maintains tribal relations among themselves and towards complainant, and complainant has at all times mentioned herein, in dealing with the said tribes, recognized such tribal relations. That complainant has at all times mentioned herein and still maintains an Indian Agent for said tribes of Indians, who has supervision and control over the tribal property belonging to said Creek Tribe of Indians. That the Creek Tribe of Indians still has a large amount of tribal property and unallotted lands belonging to the members of said tribe of Indians which is still under the control and management of the complainant.

III.

Your orator further shows that under and by virtue of the existing treaties between complainant and the Creek Tribe of Indians, and by virtue of the several Acts of Congress passed in relation to the affairs and property of the Five Civilized Tribes of Indians, the United States government has always and now does assume the relation of guardian and trustee of the property of the Indian tribes and members thereof, constituting the Five Civilized Tribes. That its political department has always declared and now declares such relation to exist between complainant and said tribes of Indians, and especially the Creek tribe, in so far as the same relates to the members and property of said tribes of Indians.

That complainant, under and by virtue of the provisions of an Act of Congress passed and approved June 28, 1898, and by virtue of the several Acts of Congress supplemental thereto and amendatory thereof, and particularly the Acts of Congress passed and approved March 1, 1901, and June 30, 1902, assumed and undertook the duty of allotting in severalty to the various members and freedmen and enrolled citizens and freedmen of said Creek Tribe or Nation of Indians, the lands belonging to said tribe of Indians. That the work of allotting the tribal lands of the Creek Tribe or Nation of Indians is still in progress by complainant, and is, as yet, uncompleted and that by virtue of complainant's right and duty as a sovereign and governing power of said tribe of Indians, and for the purpose of discharging its full duty and obligation towards said tribes of Indians, and fully executing, carrying out and discharging
4 its duty in relation to the allotment in severalty of the lands of said tribe of Indians, to the duly enrolled members thereof, according to the true spirit, intent and purpose of said trust, complainant brings and prosecutes this action in its own behalf and in behalf of the Creek Tribe or Nation of Indians.

IV.

Your orator further shows that the following described lands, to-wit:

The northwest quarter of section 9, in township 18 north, range 7 east,

was, on the first day of April, 1899, and at all the times hereinafter mentioned, and still is, a part of the land belonging to the Creek Nation of Indians as public and unallotted domain, subject to be allotted to lawfully enrolled members and citizens of the Creek Nation by complainant, under and by virtue of, and in accordance with, the terms and proceedings of the Acts of Congress passed and approved March 1, 1901, and June 30, 1902.

V.

Your orator further shows that by virtue of the authority conferred upon the Commission to the Five Civilized Tribes under the Acts of Congress passed and approved June 28, 1898, March 1, 1901, and June 30, 1902, as amended by the several acts of Congress supplemental thereto and amendatory thereof, said Commission to the Five Civilized Tribes, acting under the supervision of the Secretary of the Interior, was charged with the duty of determining who were entitled under the said acts of Congress to be enrolled as citizens and freedmen of the Creek Nation, and with the duty of surveying and allotting to the lawfully enrolled citizens and freedmen of said nation their respective due proportions of the allot-able land belonging to the said nation, of which the land hereinbefore described was a part.

VI.

Your orator further shows that one Barney Thlocco was in his lifetime a Creek Indian by blood; that he died at about the beginning of the year 1899 and prior to April 1st 1899, and he was not entitled to be enrolled as a citizen of the Creek Nation or to receive in allotment any part of its lands under the Acts of Congress hereinbefore referred to; that on or about the 24th day of May, 1901, the Commission to the Five Civilized Tribes caused the name of the said Barney Thlocco to be placed on the rolls of Creek citizens by blood which the said Commission was then preparing under the aforesaid acts of Congress; that no hearing was held or investigation made by said Commission and no evidence of any kind was produced before or obtained or had by it with respect to the said Barney Thlocco's right under said acts of Congress to be so enrolled, and the said Commission neither gave nor caused to be given to the Creek Nation or its officers or any other person, any notice that said Barney Thlocco's name was about to be or would be so enrolled, and there was no controversy, contest or adverse proceeding of any kind by or before the said Commission with respect to the enrollment of the said Barney Thlocco or his right to be so enrolled.

Your orator avers that in so causing the name of the said Barney Thlocco to be placed upon the roll of Creek citizens by blood, the said Commission acted arbitrarily and summarily and without

knowledge, information or belief that said Barney Thlocco was living or dead on April 1st, 1899, but acted on a mere arbitrary and erroneous assumption wholly unsupported by evidence or information, that the said Barney Thlocco was living on April 1st, 1899, and was entitled to be enrolled by the said Commission under the Acts of Congress aforesaid.

Your orator further shows that the said Commission in so arbitrarily assuming that the said Barney Thlocco was living on April 1st, 1899, and in so causing his name to be placed on the roll of Creek citizens by blood, made a gross mistake of fact and of law, for your orator avers that the said Commission did not know nor did they have any evidence before them at the time they caused the name of the said Barney Thlocco to be so enrolled, either showing or tending to show whether the said Barney Thlocco was living or dead on April 1st, 1899, but if the true time of the death of the said Barney Thlocco as hereinbefore alleged had been known to the said Commission at or before the time of the enrollment of the said Barney Thlocco as a citizen of the Creek Nation who had been living on April 1st, 1899, entitled to receive a distributive share of the lands of the Creek Nation, he would not have been so enrolled by the said Commission.

Your orator avers its inability to set out here any evidence taken before or had by the said Commission respecting the question whether Barney Thlocco was living or dead on April 1st, 1899, for your orator says that no evidence whatever bearing in any way upon that question was taken before or had by the said Commission.

VII.

Your orator further shows that after the said arbitrary and erroneous enrollment of the name of the said Barney Thlocco as being the name of a Creek Indian who was living on April 1, 1899, and was entitled to receive a distributive share of the unallotted domain of the Creek Nation, and on to-wit: the 30th day of June, 1902, the said Commission to the Five Civilized Tribes, being wholly without evidence or information showing or tending to show whether Barney Thlocco had been living or dead on April 1, 1899, and solely by reason of his said arbitrary and erroneous enrollment, purported to allot in the name of the said Barney Thlocco, the tract of land hereinbefore described, and accordingly, on June 30, 1902, a certificate of allotment was issued in the name of the said Barney Thlocco as if he were, and under the arbitrary assumption on the part of the said Commission that he then was a living person, that assumption being founded on no evidence or information whatever as to the time of Barney Thlocco's death or as to whether Barney Thlocco was or was not a living person on April 1, 1899, or on June 30, 1902. A true copy of the said allotment certificate is hereto attached and made a part hereof as "Exhibit A."

VIII.

Your orator further shows that after the purported allotment of the above described land in the name of the said Barney Thlocco,

homestead and allotment patents purporting to convey the said land to the said Barney Thlocco were executed by the Principal Chief of the Creek Nation on March 11, 1903, and approved by the Secretary of the Interior on April 3, 1903. A copy of the said homestead and allotment patents are hereto attached, marked "Exhibits B" and "C" respectively, and are made a part of this amended bill of complaint. The land described in the said patents comprises the same land hereinbefore described, all of which is located in what is now Creek County in the Eastern Judicial District of the State of Oklahoma. Neither of said patents has ever been delivered to the said Barney Thlocco or to any other person but the same are in the possession of complainant through its officers and agents.

IX.

Your orator further shows that knowledge or information as to the mistake of fact made by the said Commission in causing the name of the said Barney Thlocco to be enrolled and in purporting to allot to him a portion of the lands of the Creek Nation was not had by complainant until after the purported allotting of the said land and the issuance of said allotment certificate and until after the preparation, execution and approval of the said patents; nor did complainant know until thereafter that the said Barney Thlocco had died prior to April 1, 1899.

X.

Your orator further shows that on, to-wit: December 13, 1906, the Secretary of the Interior, by his executive order, caused the name of the said Barney Thlocco to be stricken from the roll of citizens by blood of the Creek Nation opposite No. 8592 on the said roll, and the said Barney Thlocco is not an enrolled citizen by blood or otherwise of the Creek Nation, and is not now, and has never been, entitled to an allotment of land therein because he has never been a lawfully enrolled citizen thereof, and because he died prior to April 1, 1899.

XI.

Your orator further shows that by reason of the error committed by the Commission to the Five Civilized Tribes by means and by reason of which an allotment was purported to be made to and in the name of the said Barney Thlocco, and the said allotment certificate was issued and the said patents executed and approved, and by reason of the recording of the said instruments in the office of the Commission to the Five Civilized Tribes, said instruments and proceedings constitute a cloud upon the Creek Nation's title to the said land, and the existence of the said cloud on the said title and the existence of the said allotment certificate and patents hinders and delays complainant in the performance of the duty imposed on it by law to allot and otherwise dispose of the lands, and to wind up the affairs of the Creek Nation.

XII.

Your orator further shows that it is informed and believes, and therefore avers the truth to be, that all and singular the defendants named in the caption hereof claim some right, title, interest or estate in and to the lands aforesaid, either by reason of being heirs at law of the said Barney Thlocco, deceased, or by reason of being guardians, grantees or lessees of the heirs or some of them, such claims being adverse to complainant and the Creek Nation, but the precise nature and extent of them being unknown to your orator; but your orator alleges the truth to be that none of the said defendants has, either at law or in equity, any right, title, interest or estate in or to the said land or any part thereof.

Forasmuch as complainant has no adequate remedy at law and can have no adequate relief except from a court of equity, and to the end, therefore, that the defendants may, if they can, show cause why complainant should not have the relief prayed for, your orator prays (subpoenas having been heretofore issued and served upon the said defendants and their appearance entered herein) that the defendants be required to make a full disclosure and discovery of the matters aforesaid according to the best and utmost of their knowledge, remembrance, information and belief, and true, direct and perfect answers make to the matters hereinbefore charged but not under oath, answer under oath being hereby expressly waived.

Your orator further prays that this court decree that the allotment certificate and patents attached hereto as Exhibits "A," "B" and "C" are void and of no effect as instruments of conveyance, and that the same be cancelled; that all the defendants be decreed to have no right, title, interest or estate in and to the said land, and that the title to said land be quieted in complainant and the Creek Nation of Indians, and that whatever cloud is cast upon the title to the said land by reason of any of the matters aforesaid, be decreed by this court to be dissolved and that said land be decreed to be a part of the public and unallotted tribal land of the Creek Nation, subject to disposition by complainant in accordance with law, and that the enrollment of the said Barney Thlocco be cancelled, and that he, or any person claiming by, through or under him, including these defendants, be decreed by this court to be not entitled to participate in the disposition of the lands, moneys and other property of the Creek Nation, and that the defendants, all and singular, be forever enjoined from asserting any claim of title to, or interest in the tract of land hereinbefore described, adverse to the complainant and the Creek Nation, and that complainant have such other relief as the court shall deem equitable, premises considered.

D. H. LINEBAUGH,

United States Attorney, Eastern District of Oklahoma;

C. C. HERNDON,

Special Assistant to the United States Attorney,

Solicitors for Complainant.

[See insert herewith for photographic reproduction of Exhibit A, marked page 8½.]

Exhibit A

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 WS
 v.
 Wildcat
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DEPARTMENT COMMISSIONER TO

Muskogee

Allotments of land and homestead designations, as
 Resolution of the Commission adopted, May 24, 19

No.	NAME	Attachment Exclusive of	Sec.	Twp.	Range
		Sub-division of			
92	Certificate 16986 Barney Thlocco	NW 4	9	18	7

Dated at Muskogee, Indian Territory, this 30
 of June, 1902.

This is to certify
 records pertaining to
 law, Chickasev, then
 and the disposition of
 and foregoing is a tr
 ment made by the Com
 name of Barney Thlo
 June 30, 1902.

~~FORE~~ LAND OFFICE.

as hereinafter described, are hereby made to the following named persons; in accordance with the 1902, viz:

[illegible]

Exhibit A.

_____ day

tify that I am the officer having custody of the
to the enrollment of the members of the Cho-
erokee, Creek and Seminole Tribes of Indians,
n of the land of said tribes, and that the above
a true and correct copy of an arbitrary allot-
Commission to the Five Civilized Tribes in the
Flocco, Creek by blood, Roll Number 8592, on

Tams Bixby

Acting Chairman

Commissioner.

Thos. Ryan
Acting Commissioner to the
Five Civilized Tribes.

Muskogee, Oklahoma, October
28, 1

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EXHIBIT B.

Homestead Deed. (39A.) Creek Indian Roll No. 8592.

The Muskogee (Creek) Nation, Indian Territory.

whom these presents shall come, Greeting:

Whereas by the Act of Congress approved March 1, 1901 (31 Stat. 861), agreement ratified by the Creek Nation May 25, 1901, provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and whereas, it was provided by said Act of Congress that each citizen might elect, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed,

Whereas, the said Commission to The Five Civilized Tribes, has determined that the land hereinafter described has been selected by or for the said Barney Thlocco, a citizen of said tribe, as a homestead, and therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority conferred in me by the aforesaid Act of Congress of the United States, do hereby grant and convey and by these presents do grant and convey unto the said Barney Thlocco all right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following described land, viz:

The southeast quarter of the northwest quarter of section nine of township eighteen (18) north and range seven (7) east

of the Indian Base and Meridian, in Indian Territory, containing (40) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions imposed by said Act of Congress and which conditions are that said land shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years; and subject, also, to the provisions of said Act of Congress relating to the use, devise and descent of said land after the death of the said Barney Thlocco; and subject, also, to all provisions of said Act of Congress relating to the raising and valuation and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Seal of said Nation to be affixed this 11th day of March, 1903.

P. PORTER,

Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior, L. R. S. Approved Apr. 3, 1903.
 Ethan A. Hitchcock, Secretary, (Seal) by Oliver A. Phelps, Clerk.
 Filed for record on the 11 day of April 1903, at 11 o'clock A. M.

EXHIBIT C.

Allotment Deed. (40A.) Creek Indian Roll No. 8592.

The Muskogee (Creek) Nation, Indian Territory.

To all whom these presents shall come, Greeting:

Whereas, by the Act of Congress approved March 1, 1901 (31 Stats., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

Whereas, it was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed, and

Whereas, the said Commission to The Five Civilized Tribes, has certified that the land hereinafter described has been selected by or on behalf of Barney Thlocco, a citizen of said tribe, as an allotment, exclusive of a forty-acre homestead, as aforesaid,

Now, therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States have granted and conveyed and by these presents do grant and convey unto the said Barney Thlocco all right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following described land, viz:

The west half of the northwest quarter and the northeast
 11 quarter of the northwest quarter of section nine (9), township eighteen (18) north and range seven (7) east

of the Indian Base and Meridian, in Indian Territory, containing One Hundred and Twenty (120) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to all provisions of said Act of Congress relating to appraisement and valuation and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 11th day of March, A. D. 1903.

P. PORTER,

Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior. L. R. S. Approved Apr. 3, 1903.
 Ethan A. Hitchcock, Secretary, (Seal) by Oliver A. Phelps, Clerk.
 Filed for record on the 11 day of April 1903 at 11 o'clock A. M.

Endorsed: Filed July 15, 1915, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 22nd day of September, A. D. 1915, the same being one of the days of a Special Session of the United States District Court for the Eastern District of Oklahoma, held at Muskogee, Oklahoma, Court met pursuant to adjournment. Present and presiding the Honorable Ralph E. Campbell, Judge.

Among the proceedings had on this day is the following:

In the United States Court for the Eastern District of Oklahoma.

No. 2017-E.

UNITED STATES OF AMERICA, Complainant,

v.

BESSIE WILDCAT et al., Defendants.

Nunc Pro Tunc Order Admitting Charles F. Bissett and Others as Defendants.

Now on this the 22nd day of September, 1915, it appearing to the court that heretofore, and on the 24th day of August, 1914, Charles F. Bissett and three others hereinafter named, were upon their own application permitted by the court to intervene and become parties defendant to this action and on said day filed their answer to the amended bill of complaint of the complainant, and it further appearing that no formal order was made and entered making said persons parties defendant;

12 It is now, as of the 24th day of August, 1914, ordered that the said Charles F. Bissett, Taxaway Oil Company, a corporation, F. L. Moore and J. S. Cosden have leave, and leave is hereby granted to them to intervene in this suit and to appear herein as defendants in the same manner and with like effect as if they were named in the amended bill of complaint as defendants having or claiming an interest.

RALPH E. CAMPBELL, Judge.

And, to-wit, on the 23rd day of October, A. D. 1914, the following proceeding was had in this cause, Honorable Ralph E. Campbell, Judge presiding.

In the District Court of the United States for the Eastern District of
Oklahoma.

No. 2017-E.

UNITED STATES OF AMERICA, Complainant,

v.

BESSIE WILDCAT et al., Defendants.

Order Granting Leave to Fulhochee Barney, Siah Barney, Tommy Barney and Mollie Barney to Intervene Herein and File Answer and Cross-petition.

On this the 23rd day of October, 1914, coming on to be heard in Muskogee the application of Fulhochee Barney, Siah Barney, Tommy Barney and Mollie Barney, for leave to intervene in this cause and to become parties defendant herein and to file an answer and cross-complaint, said parties appearing by Turner & Turner and Owen & Stone, their attorneys, and said plea of intervention having been heard by the court,

It is ordered and adjudged that leave be granted for the said parties to intervene herein and to become defendants in this cause.

And now comes said Fulhochee Barney, Siah Barney, Tommy Barney and Mollie Barney, by their said attorneys, leave of the court having been first had and obtained, and file their answer to the complainant's bill of complaint and their cross-petition against the other defendants.

RALPH E. CAMPBELL, Judge.

And, to-wit, on the 22nd day of September, A. D. 1915, the following proceeding was had in this cause. Honorable Ralph E. Campbell, Judge presiding.

13 In the United States Court for the Eastern District of
Oklahoma.

No. 2017-E.

UNITED STATES OF AMERICA, Complainant,

v.

BESSIE WILDCAT et al., Defendants.

Nunc Pro Tunc Order Admitting Howard Weber as Defendant.

Now on this the 22nd day of September, 1915, it appearing to the court that heretofore, and on the 28th day of October, 1914, Howard Weber was upon his own application permitted by the court to intervene and become a party defendant to this action and on said day

filed his answer to the amended bill of complaint of the complainant, and it further appearing that no formal order was made and entered making said Howard Weber a party defendant;

It is now, as of the 28th day of October, 1914, ordered that the said Howard Weber have leave, and leave is hereby granted him to intervene in this suit and to appear herein as a defendant in the same manner and with like effect as if he was named in the amended bill of complaint as a defendant having or claiming an interest; Provided, that this order is without prejudice to proceedings had prior to said 28th day of October, 1914, and said Howard Weber is so permitted to come into this action subject to all orders of the court in this action prior to October 28, 1914.

RALPH E. CAMPBELL, *Judge.*

And, to-wit, on the 2nd day of November, A. D. 1914, Charles F. Bisett, Toxaway Oil Company, a corporation, F. L. Moore and J. S. Cosden filed their Amended Intervening Petition herein, which is in words and figures as follows:

In the United States Court for the Eastern District of Oklahoma.

No. 2017.

UNITED STATES OF AMERICA Plaintiff,

v.

BESSIE WILDCAT et al., Defendants.

Amended Intervening Petition and Cross-petition of Charles F. Bisett, Toxaway Oil Company, F. L. Moore, and J. S. Cosden.

Come now Charles F. Bisett, Toxaway Oil Company, a corporation, F. L. Moore and J. S. Cosden, and by leave of court granted on October 28, 1914, on application of Charles F. Bisett, tender and file herein an amended intervening petition, and say that they are the owners of a valid oil and gas mining lease on the following described land situate in Creek County, Oklahoma, to-wit:

West half of southwest quarter of northwest quarter of section nine (9), township eighteen (18) north, range seven (7) east, containing 5 acres, more or less.

They further say that on or about the 19th day of May, 1913, the Commissioner to the Five Civilized Tribes issued an allotment certificate to one Jonathan R. Posey, covering the above described land, and that said Jonathan R. Posey was a citizen of the Creek Nation by blood, duly enrolled, his roll number being 9006; that this instrument was filed in the office of the Commissioner to the Five Civilized Tribes, and therein duly recorded, and was afterwards duly filed and recorded in the office of the Register of Deeds for Creek County, Oklahoma, on the 20th day of May, 1913, in book 89 at page 630. They further say that on or about the 19th day of May, 1913, the said Jonathan R. Posey duly executed and delivered an oil and gas

mining lease on the lands above described, extending for a period of fifteen years, or as long as oil or gas should be found in paying quantities on said land. It was further provided in said lease that one-tenth of the oil produced from said land should be paid to the said Jonathan R. Posey as royalty, and One Hundred Fifty Dollars (\$150.00) per year, in advance, for each gas well producing gas, when the same is sold off the premises, and Twenty-five Dollars (\$25.00) per year for each gas-producing well when the gas therefrom was used on the premises; and it further provided that the lessees therein should commence and complete a well on said premises within two years from the date thereof, or pay at the rate of One Dollar (\$1.00) per acre for each additional year until said well was completed.

That said oil and gas mining lease was delivered to Theodore E. Stidham and Joseph E. Kirkbride, and accepted by them, it being stipulated therein that said Stidham should own one-sixteenth of the working interest and the said Joseph E. Kirkbride should own fifteen-sixteenths thereof.

That on or about the 14th day of June, 1913, the said Theo. E. Stidham sold and assigned, by writing, to said Joseph E. Kirkbride, all of his right, title and interest in said leasehold estate.

That on or about the 19th day of May, 1913, said Joseph E. Kirkbride, by an instrument in writing, duly signed, acknowledged and delivered a transfer of three-fourths of his interest in and to the oil and gas mining lease above referred to, to F. L. Moore, J. S. Cosden and Toxaway Oil Company, a corporation, the said Kirkbride retaining a one-fourth interest therein. Said assignment was filed for record in the office of the Register of Deeds for Creek County, Oklahoma, on May 8, 1914, and is recorded in book 99 at page 394.

They further say that on or about the 15th day of March, 15 1914, an execution was issued from the District Court of Creek County, Oklahoma, in accordance with the valid judgment of said District Court, in a proceeding wherein Edward O'Farrell was plaintiff and Joseph E. Kirkbride was defendant, and that on or about the 19th day of March, 1914, said execution was levied upon the oil and gas mining lease in the name of said Kirkbride, and is this property, and the same was duly appraised as is required by law, and said property was sold to the highest and best bidder, after being duly advertised, and Charles F. Bisett, being the highest and best bidder, was declared the purchaser thereof and a deed and bill of sale thereto was signed, acknowledged and delivered by Henry Clay King, the duly elected and qualified sheriff of Creek County, Oklahoma, on the 5th day of July, 1914, said sale being duly confirmed by an order duly made and entered on the 15th day of July, 1914.

These interveners further say that afterwards, by contracts in writing duly made and entered into, the conflicting interests of Charles F. Bisett, Toxaway Oil Company, F. L. Moore and J. S. Cosden and Joseph E. Kirkbride were fixed and agreed upon, and that Charles F. Bisett assigned, transferred and conveyed to the Toxaway Oil Company, F. L. Moore and J. S. Cosden each an undivided one-fourth interest in said oil and gas mining lease, and that the Toxa-

way Oil Company now owns a one-fourth interest therein, F. L. Moore owns a like interest, and the said J. S. Cosden a like interest, each being the owner of an undivided one-fourth part of the working interest in said lease.

These interveners further say that the alleged heirs of Barney Thlocco have no interest in said five acres above described, or in the oil and gas mining lease thereon, and say that the allotment to Barney Thlocco and the patent issued in pursuance thereof were issued to Barney Thlocco through gross fraud and mistake perpetrated upon the agents of the United States Government having in charge the enrollment of citizens of the Creek Nation and the allotting of lands to said citizens, and they allege that Barney Thlocco was not alive on the first day of April, 1899, and was therefore not entitled to enrollment or allotment, and that the deeds of allotment and allotment certificates made in his favor under which the heirs of Barney Thlocco now claim were nullities and never vested in Barney Thlocco, or in any of his heirs, any title, legal or equitable, to the lands in controversy.

They further say that a judgment of this court has determined that Barney Thlocco was not entitled to allotment, and that the judgment of this court was not void, but merely voidable, and was afterwards set aside by this court, and that between the rendition of said judgment and the setting aside of the same, Jonathan R. Posey was allotted the lands above described.

They further say that the order appointing the receiver herein was made without the knowledge or consent of these interveners, and when they were not before the court by any process, actual or constructive, and that the court had no jurisdiction to appoint a receiver for the five acres above described, and said receiver had no right or authority to lease any of the lands herein described to the Black Panther Oil Company or to any one else, and that the lease to the Black Panther Oil Company and all interest acquired by persons claiming under it are void as to these interveners and as to the said Jonathan R. Posey.

They further say that if, at the time Barney Thlocco was allotted the lands above described, the allotment was purely arbitrary, no application was filed for allotment, no hearing was had, no evidence heard, and that there was in fact no determination, judicial or otherwise, that said Thlocco was alive on April 1, 1899.

They further say that at the time a receiver was appointed herein, and at the time the lease was made to the Black Panther Oil Company, said Black Panther Oil Company had actual and constructive notice of the rights of said Posey, the rights of said Kirkbride, and of the rights of all of these interveners.

These interveners further say that said Black Panther Oil Company and those claiming under the void lease above referred to have entered upon said land and removed therefrom great quantities of oil, and have sold the same and have appropriated the proceeds thereof to their own use.

These interveners ask that this intervening petition be treated as a cross-petition and cross-complaint against the United States and all

the defendants in this case, and that on final hearing, the lease to the Black Panther Oil Company be set aside and held for naught; that the receiver be discharged and the Black Panther Oil Company and the receiver and all persons claiming under them be required to account to these interveners for all oil taken and removed from said premises, and that said interveners be adjudged and decreed to be the owners of a valid oil and gas lease on said lands, according to the tenor of the written lease above referred to, and that their title thereto be quieted and that they recover their costs herein, and for all other proper legal and equitable relief.

SHERMAN, VEASEY & O'MEARA,

*Attorneys for Interveners, Charles F. Bisett,
Toraway Oil Company, F. L. Moore, and J. S. Cosden.*

17 STATE OF OKLAHOMA.

County of Tulsa, ss:

Charles F. Bisett, being duly sworn, states on oath that he is one of the intervenors and cross-petitioners in the foregoing cause; that he has read the above and foregoing amended intervening petition and cross-petition, and knows the contents thereof, and that the matters and things therein set forth are true as he is informed and verily believes.

CHAS. F. BISETT.

Subscribed and sworn to before me this 31st day of October, 1914.

[SEAL.]

ETHEL K. CHILDERS,

Notary Public.

My commission expires Oct. 13, 1918.

Endorsed: Filed Nov. 2, 1914, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 22nd day of September, A. D. 1915, the following proceeding was had in this cause. Honorable Ralph E. Campbell, Judge presiding.

In the United States Court for the Eastern District of Oklahoma.

No. 2017-E.

UNITED STATES OF AMERICA, Complainant,

v.

BESSIE WILDCAT et al., Defendants.

Nunc Pro Tunc Order Admitting Johnathan R. Posey as a Defendant.

Now on this the 22nd day of September, 1915, it appearing to the court that heretofore, and on the 4th day of November, 1914, Johna-

Johnathan R. Posey was upon his own application permitted by the court to intervene and become a party defendant to this action and on said day filed his answer to the amended bill of complaint of the complainant, and it further appearing that no formal order was made entered making said person a party defendant; it is now, as of the 4th day of November, 1914, ordered that the Johnathan R. Posey have leave, and leave is hereby granted to him to intervene in this suit and to appear herein as a defendant in the same manner and with like effect as if he were named in the amended bill of complaint as a defendant having or claiming an interest.

RALPH E. CAMPBELL, *Judge.*

And, to-wit, on the 4th day of November, A. D. 1914, Johnathan Posey filed his Answer and cross-petition herein, which is in words and figures as follows:

In the United States District Court for the Eastern District
in the State of Oklahoma.

(No.) 2017.

UNITED STATES OF AMERICA

v.

BESSIE WILDCAT and SANTA WATSON, Guardian of Bessie Wildcat; Cinda Lowe, Louisa Fife, Annie Wildcat, Emma West, Martha Jackson, a Minor; Sabar Jackson, Guardian and Next Friend; J. Coody Johnson, Aggie Marshall, Phillip Marshall, H. B. Beeler, Max H. Cohn, Black Panther Oil and Gas Company, a Corporation; Jack Gouge, Ernest Gouge, Fullochee Barney, Mattie Bruner, Nellie Phillips, Jennie Phillips, Billie Phillips, D. L. Berryhill, William McCombs, Barnossee Unussee, Siah Barney, Tommy Barney, Mollie Barney, Howard Weber, Charles F. Blissett, Toxaway Oil Company, by E. R. Kemp, President; F. L. Moore, J. S. Coslen, and Johnathan R. Posey, Defendants and Interveners.

Petition and Cross-petition of Johnathan R. Posey.

Comes now Johnathan R. Posey, a resident of the State of Texas, and having been on the 28th day of October, 1914, by order of court, made a party defendant in the above named and numbered cause, now enters his appearance in said cause and files this as his answer and cross-bill.

I.

For his answer this defendant admits that all the allegations in the complaint of plaintiff are true.

II.

For his cross-bill herein this defendant admits that all the allegations in the "Amended Intervening Petition and Cross-petition" Charles F. Blissett, Toxaway Oil Co., F. L. Moore and J. S. Cosden are true and joins the said Charles F. Blissett et als. in their petition that a receiver be appointed in their petition filed under leave of the court granted on the 28th day of October, 1914.

III.

For his answer as to each and every one of the above named defendants, except Charles F. Blissett et als., named above, this defendant denies each and every allegation in the answers and cross-bills by them filed, and specifically denies that Barney Thlocco was duly enrolled citizen, by blood, of the Creek, or Muskogee, Nation and denies that he was entitled to enrollment in said Nation; and denies that he was entitled to an allotment of land by reason of his citizenship in said Nation; and denies that defendants, Bess

19 Wildeat, or her guardian, Santa Watson, Cinda Lowe, Louis Fife, Annie Wildeat, Emma West, Martha Jackson, or her guardian, Saber Jackson, Aggie Marshall, Phillip Marshall, Jack Gouge, Ernest Gouge, Mattie Bruner, nee Phillipps, Jennie Phillips, Billie Phillips, D. L. Berryhill, William McCombs, Barnossee Unu see, Fullochee Barney, Siah Barney, Tommy Barney or Mollie Barney are the heirs of Barney Thlocco; and denies that they, or any one by or through them, takes any right, title or interest in or to the northwest quarter of section nine, township eighteen north, range seven east of the Indian Base and Meridian, by reason of the relationship to Barney Thlocco or as his heirs; and denies that Coody Johnson, H. B. Beeler, Max H. Cohn, the Black Panther Oil and Gas Company or Howard Weber acquired any right, title or interest therein by reason of the deeds, leases or assignments alleged to have been executed and delivered to them, or either of them, by the co-defendants as the heirs of Barney Thlocco.

IV.

For his cross-bill herein defendant states that Barney Thlocco was placed upon the roll opposite card number 3021, roll number 859 by the Commission to the Five Civilized Tribes and was, by said Commission allotted upon the following described land, situated in what is now Creek County, State of Oklahoma, to-wit:

The northwest quarter of section 9, township eighteen north, range seven east,

without authority from Barney Thlocco and without his knowledge or consent, and without any authority of law to so allot him, said allotment having been made on the 30th day of June, 1902; said allotment was made without any investigation as to whether Barne

Thlocco was then living or as to whether he was living on the 1st day of April, 1899; that at a later date, to-wit: on the 11th day of March, 1903, the deeds to said land were executed by P. Porter, principal chief of the Creek Nation, and were approved by the Secretary of the Interior on the 3rd day of April, 1903, but that neither the certificate of allotment nor the deeds were ever delivered to Barney Thlocco, or to any one authorized to receive them for him or his heirs but said instruments were held in the files of the Commission to the Five Civilized Tribes, and are now in the possession of the complainant in this cause; that no title passed to Barney Thlocco, or his heirs by reason of the non-delivery of the certificate of allotment; that the name of Barney Thlocco was stricken from the roll of citizenship of the Creek Nation, by executive order of the Secretary of the Interior, on the 13th day of December, 1906; that by this action the

20 Secretary of the Interior sought to cancel the allotment of the above described land to Barney Thlocco, but that no cancellation thereof was necessary as no notice of the filing, which had been done by the Commission arbitrarily and without authority of law, was ever given to Barney Thlocco, or to his heirs or legal representative, nor was any notice of the execution of the deeds ever given to the allottee, or his heirs or legal representative, and the above described land was at all times until about the 19th day of May, 1913, a part of the public domain of the Creek Nation and was subject to allotment by any citizen entitled to an allotment from the lands of the Nation; that this defendant is a duly recognized and enrolled citizen of the Creek Nation, enrolled opposite number 9006, and that on or about the 19th day of May, 1913, he, having been heretofore allotted 154.17 acres, applied to the Commissioner to the Five Tribes to have allotted to him as the remainder of his allotment the following described land:

The west half of the southwest quarter of the southwest quarter of the northwest quarter of section nine, township eighteen north, range seven east;

and that on said date a certificate of allotment was issued and delivered to him, and is now of record in the office of the Commissioner to the Five Tribes, a copy of said certificate being hereto attached, marked Exhibit "A" and made a part of this cross-bill, and that the certificate was filed for record and recorded in the office of the Register of Deeds for Creek County, on the 20th day of May, 1913, and is duly recorded in book 89, page 630; that since said date all the defendants in this cause have had full and complete notice of the claims of this defendant in and to said land.

Further pleading defendant states that he, on the 19th day of May, 1913, executed and delivered to Theodore E. Stidham and Joseph E. Kirkbride an oil and gas lease on said five acres, and that by various assignments Charles F. Blissett, Toxaway Oil Co., F. L. Moore and J. S. Cosden are now the owners of said lease and this defendant here and now joins in the "Amended Intervening Petition and Cross-petition" of said parties and in their prayer for the appointment of a receiver to take charge of the above mentioned five acres; that the

alleged heirs of Barney Thlocco have no interest in five acres above described, nor in the oil and gas mining lease thereon, and that the allotment to Barney Thlocco, the certificate of allotment and the deeds to said land were all made by reason of gross fraud practised on the Commission to the Five Tribes; that said instruments, by reason of the gross fraud hereinafter set out, practiced on the Commission and by reason of their non-delivery to Barney

21 Thlocco, or his heirs or legal representatives, conveyed no title either legal or equitable to said parties; that Barney Thlocco died prior to the first day of April, 1899, and therefore was not entitled to an allotment of land in the Creek Nation, and that all instruments attempting to allot said land to him, or in his name, were nullities and conveyed no title thereto and that the striking of his name from the rolls and the cancellation of his allotment by the Secretary of the Interior was notice to all claimants by, through or under him, subsequent to said cancellation, that his rights were disputed, and that none of the claimants through his heirs, nor the heirs, are innocent purchasers or holders of any title or interest in said land.

Defendant further states that a judgment of this court determined that Barney Thlocco was not entitled to an allotment, that said judgment was not void but merely voidable, and was afterward set aside, but, that while said judgment was in full force and effect the five acres claimed by this defendant was allotted to him.

Defendant further states that the appointment of the receiver in this cause was made without notice, and without the knowledge or consent of this defendant, and was made since the allotment certificate, on said five acres was delivered to this defendant and in utter disregard of the rights of this defendant, and with full and complete constructive notice of his rights; that the court had no right to appoint a receiver for said five acres and the receiver acquired no right, nor authority, by said appointment, to lease said five acres and that said lease conveyed no rights to the Black Panther Oil and Gas Company, nor to any one else, to develop said land for oil and gas, and that the lease to the Black Panther Oil and Gas Company, and as to all their privies as well, is void as to this defendant.

Defendant further states that the Black Panther Oil and Gas Company, and their privies, Howard Weber et als., have entered upon said land and have removed *therefore* great quantities of oil, and have sold same and appropriated the proceeds of said sale to their own use to the great damage of this defendant.

Wherefore this defendant prays that the certificate of allotment and the deeds to Barney Thlocco and all the deeds, leases and assignments from the heirs of Barney Thlocco to their co-defendants, and the lease to the Black Panther Oil and Gas Company and all assignments thereof, be set aside, cancelled and held for naught; that the Black Panther Oil and Gas Company and the receiver and all persons claiming, or to claim, any interest through them, or either of them, be required to account to this defendant for one-tenth

22 of all oil taken and removed from said premises, and that the receiver, as to said five acres be discharged, and that this de-

defendant be adjudged and decreed to be the owner and entitled to the immediate possession, and that he be ordered placed in possession, of said five acres and that his title to same be forever quieted an him and that all the defendants, except those holding under the lease from this defendant, be enjoined and restrained from asserting or claiming any right, title or interest in said land and from interfering with the possession and rights of this defendant therein, and for all other proper relief, whether legal or equitable, to which he may show himself entitled.

F. SCRUGGS,

Attorney for Johnathan R. Posey.

STATE OF OKLAHOMA,

Muskogee County, ss:

F. Scruggs, attorney for Johnathan R. Posey, having been first duly sworn, states that Johnathan R. Posey is a resident of the State of Texas and is not now in the State of Oklahoma; that he, as attorney for Johnathan R. Posey, has read the foregoing answer and cross-bill, and knows the contents thereof, and that the matters and things therein set forth are true as he is informed and verily believes.

F. SCRUGGS.

Subscribed and sworn to before me this 4th day of October, 1914.

[SEAL.]

G. H. SWAN,

Notary Public.

My commission expires Oct. 10, 1917.

(Lien claimed, F. Scruggs.)

Endorsed: Filed Nov. 4, 1914, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 4th day of November, A. D. 1914, the following proceeding was had in this cause. Honorable Ralph E. Campbell, Judge presiding.

In the District Court of the United States for the Eastern District of Oklahoma.

In Equity. No. 2017.

THE UNITED STATES OF AMERICA, Complainant,

v.

CINDA LOWE, LOUISA FIFE, ANNIE WILDCAT, EMMA WEST, MARTHA JACKSON, a Minor, and Saber Jackson, as Guardian and Next Friend of the said Martha Jackson, a Minor, Defendants.

Order.

Now, on this the 4th day of November, 1914, comes on for hearing the above entitled cause, the application for leave to intervene herein

by Toney Chupco, Joseph Chupco, James C. Chupco, Ed
 23 Larney, Polly Yargee, nee Larney, Tomy Chupco, Sarkar
 Chupco, Dick Larney, a minor, Moser Chupco, a minor, ch
 dren of Micco Chupco; Aggie Marshall, Linda Harjo, Mary Jon
 children of Salley Larney; Loley Cooper, child of Cooper Chup
 and Celia Yahola, daughter of Johnnie Larney, deceased, all of t
 parties to this cause being present by their attorneys and the cou
 being duly advised in the premises finds:

That said application to intervene should be granted; and that t
 applicants should be allowed to file their pleadings in this cause
 such interveners.

It is therefore ordered and adjudged by the court that the sa
 Toney Chupco, Joseph Chupco, James C. Chupco, Sarkarye Chup
 Polly Yargee, nee Larney, Tomy Chupco, Eddie Larney, Di
 Larney, a minor, Moser Chupco, a minor, children of Micco Chup
 Aggie Marshall, Linda Harjo, Mary Jones, children of Sallie Larne
 Loley Cooper, child of Cooper Chupco and Celia Yahola, daughter
 Johnnie Larney, deceased, be and they are hereby allowed to int
 vene in this cause, and are hereby make parties defendant here
 subject, however, to all prior orders of the court; said intervening
 fendants are allowed fifteen days from this date in which to plead.

RALPH E. CAMPBELL, *Judge*.

And, to-wit, on the 4th day of November, A. D. 1914, the follo
 ing proceeding was had in this cause. Honorable Ralph E. Can
 bell, Judge presiding.

In the United States District Court for the Eastern District
 Oklahoma.

No. 2017. In Equity.

UNITED STATES OF AMERICA, Complainant,

v.

BESSIE WILDCAT et al., Defendants.

Order.

Now on this 4th day of November, 1914, same being a regular c
 of the special 1914, term of said court, this cause comes on for be
 ing upon the petition of Charels S. Smith, Nora Watson, a minor, Jo
 Smith, Lewis Smith, Lawrence Smith, Guy Smith, Ella Looney,
 Smith, Edna Pike, nee Smith, Pearl Smith, Willie Smith, a mir
 J. S. Tilly, guardian of Willis Smith, a minor, Rannie Smith, E
 abeth Ryne, nee Smith, Rashie C. Smith, Montie Nunn, nee Sm
 and Lou Smith for leave to intervene and be made parties defenda
 in said cause, and the court having heard the petition and being
 vided in the premises:

It is ordered, adjudged and decreed that the above m

tioned Charles S. Smith, Nora Watson, a minor, John Smith, Lewis Smith, Lawrence Smith, Guy Smith, Ella Looney, nee Smith, Edna Pike, nee Smith, Pearl Smith, Willis Smith, a minor, J. S. Tilly, guardian of Willis Smith, a minor, Rannie Smith, Elizabeth Rhyne, nee Smith, Rashie C. Smith, Montie Nunn, nee Smith, and Lou Smith be made parties defendants in this cause, and that they be allowed 15 days from the date of this order to file their answers, either joint or several, to complainant's amended bill.

It is further ordered that the above named intervenors may have 15 days from this date to plead, either by way of answer or cross-complaint, against the other defendants in this cause.

RALPH E. CAMPBELL, *Judge*.

And, to-wit, on the 4th day of November, A. D. 1914, the following proceeding was had in this cause. Honorable Ralph E. Campbell, Judge presiding.

In the United States District Court in and for the Eastern District of Oklahoma.

No. 2017.

UNITED STATES OF AMERICA, Complainant,

v.

BESSIE WILDCAT et al., Defendants.

Order Appointing Guardian ad Litem of Defendant Bessie Wilcat.

This cause coming on to be heard on this the 4th day of November, 1914, upon the petition of Bessie Wilcat, a minor, for the appointment of a guardian ad litem for one of the defendants in the above entitled action and plaintiff in a cross complaint filed by her in the said action, and,

It appearing to the court that Santa Watson is a compe-ent and responsible person, and that he has consented to act as such guardian ad litem,

It is hereby ordered that the said Santa Watson be and he is hereby appointed guardian ad litem for the said Bessie Wilcat, a minor, and is authorized and directed to appear and defend the above entitled action on her behalf, and to prosecute the same under the cross-petition filed in said cause.

RALPH E. CAMPBELL, *Judge*.

And, to-wit, on the 5th day of November, A. D. 1914, the following proceeding was had in this cause. Honorable Ralph E. Campbell, Judge presiding.

In the District Court of the United States for the Eastern District of
Oklahoma.

No. 2017. Equity.

UNITED STATES OF AMERICA, Complainant,

25

v.

BESSIE WILDCAT et al., Defendants.

*Order Appointing Guardian ad Litem for Martha Jackson
pro Tunc.*

This cause came on to be heard on this the 5th day of November, 1914, on the motion of J. Coody Johnson for a nunc tunc order appointing Saber Jackson as guardian ad litem of Martha Jackson in this suit; and it appearing to the court that said Saber Jackson is the father and duly appointed guardian of said Martha Jackson and that said Martha Jackson is a minor under eighteen years of age; and it further appearing to the court that entry was made on the 28th of October, 1914, in this cause so appointing said Saber Jackson as such guardian ad litem, as on that date was authorized by this court, it is now adjudged and ordered by this court that the said Saber Jackson be appointed guardian ad litem in this cause for said minor Martha Jackson and that an order be entered and operate as of said 28th day of October, 1914.

RALPH E. CAMPBELL, Judge.

And, to-wit, on the 13th day of November, 1914, the following proceeding was had in this cause. Honorable Ralph E. Campbell, Judge presiding.

In the United States District Court for the Eastern District of Oklahoma.

No. 2017. In Equity.

THE UNITED STATES OF AMERICA, Complainant,

v.

BESSIE WILDCAT et al., Defendants.

Order Appointing Guardian ad Litem.

On this 13th day of November, 1914, it being made to appear to the court that Nora Watson and Willis Smith, heretofore made defendants in this cause, are minors under the age of fourteen years and that it is proper and necessary that a guardian ad litem be

pointed herein to represent said minors and to prosecute and defend in this behalf in this cause:

It is hereby ordered that J. F. Brett be and he is hereby appointed guardian ad litem for said Nora Watson and Willis Smith, minors, and is hereby authorized and directed to do and perform all things proper and necessary to prosecute and defend the interests of said minors as defendants in this cause.

RALPH E. CAMPBELL, *Judge.*

26 And, to-wit, on the 23rd day of November, A. D. 1914, the following proceeding was had in this cause. Honorable Ralph E. Campbell, Judge presiding.

In the District Court of the United States for the Eastern District of Oklahoma.

No. 2017-E.

THE UNITED STATES OF AMERICA, Complainant,

v.

BESSIE WILDCAT, a Minor; SANTA WATSON, as Guardian of BESSIE WILDCAT, a Minor; Cinda Lowe, Louisa Fife, Annie Wildcat, Emma West, Martha Jackson, a Minor; Saber Jackson, as Guardian and Next Friend of Martha Jackson, a Minor; J. Coody Johnson, Aggie Marshall, Phillip Marshall, H. B. Beeler, Max H. Cohn, Black Panther Oil & Gas Company, a Corporation; Jack Gouge, Ernest Gouge, Mattie Bruner (Formerly Mattie Phillips), Jennie Phillips, Billie Phillips, D. L. Berryhill, William McCombs, and Barnossee Unussee, Defendants.

Order.

Upon the application of Saber Jackson to be allowed to intervene as a party defendant in the above cause.

It is ordered that said Saber Jackson be allowed to intervene and to file his answer and cross-petition therein within ten days from this date upon the condition expressly made and no other, that said Saber Jackson is bound by all of the orders and proceedings heretofore taken in this cause in as full a manner and as completely as though he had been an original party defendant herein.

Dated Nov. 23rd, 1914.

RALPH E. CAMPBELL, *Judge.*

And, to-wit, on the 23rd day of November, A. D. 1914, the following proceedings were had in this cause. Honorable Ralph E. Campbell, Judge presiding.

In the United States District Court for the Eastern District
Oklahoma.

No. 2017. In Equity.

THE UNITED STATES OF AMERICA, Complainant,

v.

BESSIE WILDCAT et al., Defendants.

*Order Granting Leave to Martha Simmons et al. to Intervene
Making Them Parties Defendant.*

On this the 23rd day of November, 1914, it being a regular
of a term of said court, came on to be heard the application of M
tha Simmons and Hannah Bullet, to be allowed to interv
27 in the above stated cause, by being made parties defend
in said cause, and said application being heard and und
stood by the court.

It is hereby considered and ordered by the court that the s
Martha Simmons and Hannah Bullet, be and they are hereby ma
parties defendant to said above stated cause and be and hereby
granted ten days from the date of this order in which to file th
answer and cross bill in said cause.

Provided, however, that this order is granted with the expr
condition that the said Martha Simmons and Hannah Bullet,
defendants in said cause consent to and are to be subject to all pr
orders made by the court in said cause.

RALPH E. CAM-BELL, Judge.

And, to-wit, on the 22nd day of September, A. D. 1915, the f
lowing proceeding was had in this cause. Honorable Ralph
Campbell, Judge presiding.

In the United States Court for the Eastern District of Oklahon

No. 2017-E.

UNITED STATES OF AMERICA, Complainant,

v.

BESSIE WILDCAT et al., Defendants.

*Nunc pro Tunc Order Admitting Robert Owen Burton and Othe
as Defendants.*

Now on this the 22nd day of September, 1915, it appearing
the court that heretofore, and on the 4th day of May, 1915, Robe
Owen Burton and six others hereinafter named, were upon the
own application permitted by the court to intervene and becom
parties defendant to this action and on said day filed their answ
to the amended bill of complaint of the complainant by joining
the joint answer of certain of the defendants and intervenors, ar
it further appearing that no formal order was made and enter
making said persons parties defendant;

It is now, as of the 4th day of May, 1915, ordered that the said Robert Owen Burton, Nathaniel Mack Burton, Lydia Belle Wilson, nee Burton, Samuel L. Burton, Abi L. Miller, nee Burton, Minnie Ola Edwards, nee Burton and Mary Eliza Burton have leave, and leave is hereby granted to them to intervene in this suit and to appear herein as defendants in the same manner and with like effect as if they were named in the amended bill of complaint as defendants having or claiming an interest, provided, that this order is without prejudice to proceedings had prior to said 4th day of May, 1915, and said parties are so permitted to come into this action subject to all orders of the court in this action prior to May 4, 1915.

RALPH E. CAMPBELL, *Judge*.

28 And, to-wit, on the 4th day of May, A. D. 1915, the defendant- herein filed joint answer, which is in words and figures as follows:

In the United States District Court for the Eastern District of Oklahoma.

No. 2017. Equity.

THE UNITED STATES OF AMERICA, Complainant,

v.

BESSIE WILDCAT et al., Defendants.

Answer of All the Defendants and Interveners Herein Who Oppose the Attempted Cancellation of the Enrollment and Allotment of Barney Thlocco, Deceased, to-wit, Bessie Wildcat, a Minor; Santa Watson, as Guardian of Bessie Wildcat; Cinda Lowe, Louisa Fife, Annie Wildcat, Emma West, Martha Jackson, a Minor; Sabar Jackson, as Guardian and Next Friend of Martha Jackson, a Minor; J. Coody Johnson, Aggie Marshall, Phillip Marshall, H. B. Beeler, Max H. Cohn, Black Panther Oil & Gas Company, a Corporation; Mattie Bruner, Formerly Mattie Phillips; Jennie Phillips, Billie Phillips, D. L. Berryhill, William McCombs, Barnossee Unussee, Fulhohchee Barney, Siah Barney, Tommy Barney, Mollie Barney, Toney Chupko, Joseph Chupko, James C. Chupko, Eddie Larney, Polly Yargee, nee Larney; Tommy Chupko, Sarkarye Chupko, Dick Larney, a Minor; Moser Chupko, a Minor; Linda Harjo, Mary Jones, Loley Cooper, Hannah Bullette, Martha Simmons, Charles F. Smith, John Smith, Louis Smith, Laurence Smith, Guy Smith, Ella Looney, nee Smith; Edna Pike, nee Smith; Pearl Smith, Nora Watson, and Willis Smith, Minors; Rannie Smith, Elizabeth Rhyne, nee Smith; Rashie C. Smith, Montie Nunn, nee Smith; Lou Smith, Howard Weber, Sabar Jackson, Jack Gouge, and Earnest Gouge, Robert Owen Burton, Nathaniel Mack Burton, Lydia L. Wilson, nee Burton; Samuel L. Burton, Abi L. Miller, nee Burton; Minnie Ola Edwards, nee Burton, and Mary Eliza Burton.

Come now the following named defendants and interveners, the same being all of the parties hereto who oppose the attempted can-

cellation of the enrollment and allotment of Barney Thlocco, deceased, to-wit: Bessie Wildcat, a minor, Santa Watson, as guardian of Bessie Wildcat, Cinda Lowe, Louisa Fife, Annie Wildcat, Emma West, Martha Jackson, a minor, Saber Jackson as guardian and next friend of Martha Jackson, a minor, J. Coody Johnson,

29 Aggie Marshall, Phillip Marshall, H. B. Beeler, Max H. Cohn, Black Panther Oil & Gas Company, a corporation, Mattie Bruner, formerly Mattie Phillips, Jennie Phillips, Billie Phillips, D. L. Berryhill, William McCombs, Barnosee Unussee, Fulhohchee Barney, Siah Barney, Tommy Barney, Mollie Barney, Toney Chupko, Joseph Chupko, James C. Chupko, Eddie Larney, Polly Yargee, nee Larney, Tommy Chupko, Sarkarye Chupko, Dick Larney, a minor, Moser Chupco, a minor Linda Harjo, Mary Jones, Loley Cooper, Hannah Bullette, Martha Simmons, Charles F. Smith, John Smith, Louis Smith, Lawrence Smith, Guy Smith, Ella Looney, nee Smith, Edna Pike, nee Smith, Pearl Smith, Nora Watson and Willis Smith, minors, Rannie Smith, Elizabeth Rhyne, nee Smith, Rashie C. Smith, Montie Nunn, nee Smith, Lou Smith, Howard Weber, Saber Jackson, Jack Gouge, Earnest Gouge, and Robert Owen Burton, Nathaniel Mack Burton, Lydia Bell Wilson, Samuel L. Burton, Abi L. Miller, Minnie Ola Edwards, Mary Eliza Burton, and for their answer to the Amended Bill of the United States, say:

I.

That said Bill of Complaint does not state facts sufficient to sustain a cause of action on behalf of complainant or to entitle complainant to the relief prayed for in said Bill of Complaint.

II.

That these defendants and interveners, hereinafter styled defendants, admit that they claim the land involved in this action, to-wit:

The northwest quarter of section nine (9), township eighteen (18) north, range seven (7) east,

as heirs of Barney Thlocco, deceased, or as assignees of said heirs, and aver that the respective interests of these defendants as such heirs or assignees and as to their rights between themselves are not pleaded in this answer, but the same are reserved as between themselves and will be determined upon further pleadings to be filed by them when the claim asserted by the United States is disposed of.

III.

That these defendants admit that for a long period of time last past, that portion of the Territory belonging to the United States, known and designated as Indian Territory, and now forming a part of the State of Oklahoma, and within the Eastern Judicial

30 District thereof, has been occupied by the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes, or nations of In-

as; that the land described in the Bill of Complaint herein is in
 portion of said Territory formerly occupied by the Creek Na-
 t.

IV.

That these defendants admit that the complainant, under and by
 virtue of the Act of Congress passed and approved on June 28, 1898,
 and by virtue of other Acts of Congress supplemental thereto and
 amendatory thereto, and particularly the Acts of Congress passed and
 approved March 1, 1901, and June 30, 1902, assumed and under-
 took the duty of allotting, in severalty, to the various members and
 freedmen, and enrolled citizens and freedmen of the Creek Tribe or
 Nation of Indians, the lands belonging to said Tribe or Nation of
 Indians; and these defendants say that they are without knowledge
 as to whether the work of allotting the lands of the Creek Nation is
 all in progress or whether the same is incomplete. That these de-
 fendants are without knowledge as to whether the complainant brings
 and prosecutes this action in its own behalf or in behalf of the Creek
 Nation of Indians, by virtue of its right and duty as a sovereign
 power of said Tribe of Indians, and for the purpose of discharging
 its full duty to said Tribe of Indians, and for the purpose of execut-
 ing, discharging and carrying out its duty in relation to the allot-
 ment in severalty in the lands of said Tribes of Indians to the duly
 enrolled members thereof according to the true intent of said trust;
 but these defendants admit that the complainant occupies some sort
 of a trust relation or guardianship concerning the unallotted lands
 of the Five Civilized Tribes of Indians, but have no knowledge of
 the exact duties of the complainant as such guardian or trustee, or
 the exact extent of complainant's rights and obligations as such.

V.

These defendants admit that said land was, on the first day of
 April, 1899, a part of the land belonging to the Creek Tribe or Na-
 tion, of Indians, and was a part of the public domain of the Creek
 Tribe of Indians, authorized to be allotted to the duly enrolled mem-
 bers and freedmen citizens of said Tribe of Indians, and under and
 by virtue of, and in accordance with the terms and provisions of the
 Act of Congress passed and approved March 1, 1901, and June 30,
 1902; but these defendants deny that said land is now a part of the
 land belonging to the Creek Tribe, or Nation, of Indians, and deny
 that it is now a part of the public domain of the Creek Nation, or
 Tribe of Indians.

VI.

That these defendants admit that the Commission to the Five
 Civilized Tribes, acting under the supervision of the Secretary of the
 Interior, was charged with the duty of determining who were en-
 titled under the laws of the United States to be enrolled as citizens
 of the Creek Nation and that said Commission was charged with the

duty of surveying and allotting to the lawfully enrolled citizens of the Creek Nation their respective and due portions of the allot-able land of said Nation.

VII.

These defendants admit that one Barney Thlocco was, in his lifetime, a Creek Indian, by blood, and deny that he died prior to April 1, 1899, and deny that Barney Thlocco was not entitled to be enrolled as a citizen of the Creek Nation, or to receive in allotment any part of its lands as was set up in the Bill of Complaint; and these defendants admit that *on* or about the year 1901, the Commission to the Five Civilized Tribes caused the name of Barney Thlocco to be placed on the rolls of the Creek citizens, by blood, which said Commission was then preparing under the aforesaid Acts of Congress, but say that they have no information as to whether the enrollment took place on the 24th day of May, as alleged in said petition.

These defendants further say that in so causing the name of Barney Thlocco to be placed on the roll of citizens by blood of the Creek Nation that said Commission did not make a gross mistake of fact and of law, and did not act without evidence, and did not act arbitrarily, but that said Commission acted in accordance with law and upon the evidence which was before them at the time, and upon which they had a right to act. And these defendants say that on the first day of April, 1899, the said Barney Thlocco was a Creek Indian by blood, and was entitled under the Acts of Congress in this behalf to be duly enrolled upon the Creek Roll of Indians, and was so enrolled by said Commission created by Act of Congress in the discharge of their duties, and acting upon evidence satisfactory to them, and sufficient in law, and in fact, to authorize said Commission in placing the name of said Barney Thlocco on said rolls.

These defendants further say that they have no knowledge or information as to what notice, if any, was given by said Commission to the Creek Nation or its officers as to the proposed enrollment of Barney Thlocco, and in this connection they allege that under the rules and regulations of said Commission, which were approved by the Secretary of the Interior, no notice was required to be given to said Creek Nation or any of its officers of the intended enrollment of any Creek citizen or of any proposed action of said Commission with reference to such Creek citizen, and they further allege that the said Barney Thlocco was enrolled and allotted in like manner as all other Creek citizens, regularly and in accord with the approved practice of said Commission.

VIII.

Further answering, these defendants say that they admit that on the 30th day of June, 1902, the said Commission to the Five Civilized Tribes allotted in the name of the said Barney Thlocco the land described in the petition, and issued a certificate of allotment therefor in the name of said Barney Thlocco; and these defendants further

admit that the copy of said Allotment Certificate attached to said petition is a true and correct copy thereof; but these defendants say that it is not true that said allotment certificate was issued upon the arbitrary assumption that Barney Thlocco was a living person on April 1, 1899, and allege, as a matter of fact, the said Barney Thlocco was a living person on said date, and a Creek Indian by blood, and entitled to be placed on said rolls and to an allotment; and in this connection these defendants further allege that though it is true that said Barney Thlocco had died prior to the selection and allotment of said land, which was made on the 30th day of June, 1902, it was in accord with the usage, practice and custom of the Commission to the Five Civilized Tribes to so issue said allotment certificate in the name of the allottee for the use and benefit of the heirs, and that the said selection and allotment inured to the benefit of the heirs in like manner as if the allotment certificate had been issued in the name of the heirs.

IX.

These defendants admit the execution and approval of the patents conveying said allotment, as alleged in the Bill of Complaint, and admit that said patents were not delivered to Barney Thlocco, but in this connection they aver that immediately after the issuance of said patents they were duly and lawfully recorded by the Commission to the Five Civilized Tribes in the books of record provided by law for such purpose, and that said record operated as a delivery of the patents.

X.

That these defendants deny that any knowledge ever came to said Commission as to a mistake of fact made by said Commission in causing the name of said Barney Thlocco to be enrolled and in allotting him the land above described, and they further aver that no mistake of fact was made by said Commission in that respect.

XI.

These defendants say that they are without knowledge as to whether, on the 13th day of December, 1906, the Secretary of the Interior by his order caused the name of Barney Thlocco to be stricken from the roll of Creek citizens, and in this connection they aver that if the name of the said Barney Thlocco was so stricken that it was illegally done, without due process of law, and without notice to any of the heirs of said Barney Thlocco, and without notice to any person who was entitled to notice, and said act was void.

XII.

That the Commission to the Five Civilized Tribes was, by various Acts of Congress and Treaties with the Creek Nation, vested with

full and complete power, authority and jurisdiction to enroll Creek citizens and to allot the lands of said Nation to the enrolled members of the tribe, and the acts of said Commission in enrolling said Barney Thlocco and in allotting said land in his name for the benefit of his heirs, were judicial in their nature and that the said Commission to the Five Civilized Tribes having, as hereinbefore set forth, enrolled said Barney Thlocco, and having made said allotment in the usual and ordinary course of the authorized work of said Commission and upon such hearing and evidence as the Commission deemed satisfactory, and the work of said Commission having been approved by the Secretary of the Interior, said enrollment, allotment and patent cannot be cancelled, nor can the issue of fact upon which the Commission placed then name of said Barney Thlocco upon the approved Creek roll be tried again, and these defendants say that this court is without authority of law or jurisdiction to reopen and retry the question of fact sought to be put in issue by the United States. They further allege that by Act of Congress said final roll of the Creek Nation approved by the Secretary of the Interior has been made final and conclusive and not subject to attack.

XIII.

And defendants further say that complainant *ought* not to have and recover herein because defendants aver and say, that the different causes of action upon which complainant predicates its bill are barred by the Federal Statute of Limitation of six years, being the 26th Statutes at Large, Section 8, 1099.

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XIV.

And defendants further say that the patent of Barney Thlocco was issued on the 11th day of March, 1903, and recorded in the office of the Commission to the Five Civilized Tribes on the — day of —, 1903, more than thirteen years ago. That the complainant with the full knowledge of all the facts, did not commence any proceeding to set aside, vacate or annul said patent until the institution of this suit, and defendants therefore say that complainant has been guilty of laches and that its failure to prosecute a suit to set aside and annul said patent has been such laches as ought to and does bar this action in a court of equity.

Wherefore, these defendants pray that the complainant's Amended Bill of Complaint be dismissed and that they may recover judgment, for their costs herein and all other proper relief.

SHEA & BLUE,

Attorneys for Howard Weber.

STUART, CRUCE & CRUCE,

*Attorneys for Black Panther Oil and
Gas Company, a Corporation.*

RAMSEY AND DE MEULES,
D. REPLOGLE,

*Attorneys for Bessie Wildcat, Cinda Lowe,
Louisa Fife, Annie Wildcat, Santa Watson,
as Guardian of Bessie Wildcat.*

MALCOM E. ROSSER,
WILLIAM S. COCHRAN,

Attorneys for H. B. Beeler.

J. COODY JOHNSON,

Attorneys for J. Coody Johnson.

JOHN DEVEREUX,

Attorneys for Saber Jackson.

TURNER & TURNER,

OWEN & STONE,

*Attorneys for Barnossee Unussee, Fulhokchee
Barney, Siah Barney, Tommy Barney, and
Mollie Barney.*

J. COODY JOHNSON,

*Attorneys for Martha Jackson and Saber
Jackson, as Guardian of said Martha Jackson.*

FURRY & MOTTER,

*Attorneys for D. L. Berryhill, Charles F. Smith,
Nora Watson, John Smith, Louis Smith,
Lawrence Smith, Guy Smith, Ella Looney,
Edna Pike, Pearl Smith, Willis Smith, Ran-
nie Smith, Elizabeth Rhync, Rashie C.
Smith, Montie Nunn and Lou Smith.*

FRANKLIN & CAREY,

*Attorneys for Aggie Marshall, Toney Chupko,
Joseph Chupko, James C. Chupko, Eddie
Larney, Polly Yargee, Sarkarye Chupko,
Dick Larney, Moser Chupko, Tommy Chup-
ko, Linda Harjo, Mary Jones, Loley Cooper,
Phillip Marshall.*

ED HIRSCH,

Attorneys for Max H. Cohn.

HAZEN GREEN,

E. J. VAN COURT,

*Attorneys for Mattie Bruner, Billie Phillips,
Jennie Phillips, Jack Gouge, Ernest Gouge,
William McCombs.*

WM. A. COLLIER,

*Attorneys for Martha Simmons and
Hannah Bullett.*

DE ROOS BAILEY,

J. E. WYAND,

C. A. MOON,

*Att'ys for Robert Owen Burton, Nathaniel Mack
Burton, Lydia Bell Wilson, Samuel L. Bur-
ton, Abi L. Miller, Minnie Ola Edwards,
Mary Eliza Burton.*

Endorsed: Filed May 4, 1915. R. P. Harrison, Clerk U
trict Court, Eastern District of Oklahoma.

And, to-wit, on the 4th day of May, A. D. 1915, the Com
the United States of America, filed Motion to Strike the Jo
swer of the Defendant-, which is in words and figures as fol

36 In the United States District Court for the Eastern D
Oklahoma.

No. 2017-E.

UNITED STATES OF AMERICA, Complainant,

v.

BESSIE WILDCAT et al., Defendants.

Motion to Strike.

Comes now the complainant by its solicitors of record an
the court to strike the answer of all the defendants and int
herein filed in this action on the 4th day of May, 1915, for th
and upon the ground that said answer fails to set forth facts
in law to constitute any defense to the cause of action set for
amended bill of complaint.

D. H. LINEBAUGH,
United States Attorney

W. P. Z. GERMAN,
Special Assistant to the United States Attorney
Solicitors for Complainant

R. C. ALLEN,
Creek National Attorney,
Associate Solicitor for Complainant.

Endorsed: Filed May 4, 1915. R. P. Harrison, Clerk U
trict Court, Eastern District of Oklahoma.

And, to-wit, on the 4th day of May, A. D. 1915, the f
proceedings were had in this cause. Honorable Ralph E. C
Judge presiding.

In the United States District Court for the Eastern District of Oklahoma.

In Equity. No. 2017.

UNITED STATES OF AMERICA, Complainant,

v.

BESSIE WILDCAT et al., Defendants.

Order Overruling Motion to Strike Joint Answer of Defendants and Interveners.

On this 4th day of May, 1915, came on to be heard the motion of the complainant, the United States of America, to strike the joint answer of the defendants and interveners, Bessie Wildcat et al., and the court having heard *and* arguments of counsel and being advised in the premises.

It is ordered that said Motion to Strike the Joint Answer of the defendants and interveners, be and the same is hereby overruled. To which action of the court in overruling said motion, the complainant the United States of America, duly excepted and the exceptions were allowed by the court.

37 And, to-wit, on the 30th day of October, A. D. 1915, the complainant filed Statement of the Evidence, which is in words and figures as follows:

No. 2017-E.

In the United States Court for the Eastern District of Oklahoma.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Comes now the appellant by its solicitors and states that the following constitutes its statement in simple and condensed form of the evidence admitted, and that offered and rejected, and of all the proceedings at the final hearing of this cause in the United States Court for the Eastern District of Oklahoma, the testimony of the witnesses being stated in the most part in narrative form, all of which appellant desires shall be included in the record on appeal, and where in said statement appellant has by quotation stated testimony in the exact words of the witnesses, the appellant desires that

all such quoted testimony be so reproduced and prays the court direct.

Wherefore, appellant prays that said statement be approved.

D. H. LINEBAUGH,
United States Attorney

W. P. Z. GERMAN,
Special Assistant to the United States Attorney
Solicitors for Appellants

In the United States Court for the Eastern District of Oklahoma

No. 2017-E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

*Appellant's Condensed Statement of the Evidence and Proceedings
at the Final Hearing of This Action.*

Now on this the 5th day of May, 1915, at Muskogee, within the Eastern District of Oklahoma, the above entitled and numbered action came on to be heard for final trial before the Honorable Ralph E. Campbell, District Judge, presiding, and thereupon

There appeared on behalf of the United States: D. H. Linebaugh, Esq., United States Attorney, W. P. Z. German, Esq., and R. C. Allen, Esq., Special Assistant to the United States Attorney; and R. C. Allen, Esq., National Creek Attorney;

And by consent of the solicitors for complainant and appellees, the permission of the court there also appeared on behalf of the complainant: James A. Veasey, Esq., and A. A. Davidson, Esq.;

On behalf of the defendant, Johnathan R. Posey, F. S. Posey, Esq.;

On behalf of the defendants, Charles F. Bissett, Taxaway Oil Company, a corporation, F. L. Moore and J. S. Cosden; James A. Davidson, Esq., and A. A. Davidson, Esq.;

And on behalf of the defendants and interveners who filed a joint answer to the bill of complaint as amended: Messrs. J. B. and de Meules and D. Replogale, Esq., Messrs. Owen and Messrs. Stuart, Cruce and Cruce, Messrs. Franklin and Messrs. Rosser and Cochran, Ed Hirsh, Esq., Messrs. Le Stuart and Bell, Hazel Green, Esq., E. J. Van Court, Esq., B. Tally, Esq., Messrs. Furry and Motter, Messrs. Shea and Messrs. Bailey, Wyand and Moon, William J. Gregg, Esq., f. Deverux, Esq., William A. Collier, Esq., and J. Coody Johnson representing their respective clients as indicated in their signature to the said joint answer;

And thereupon evidence was introduced and proceedings herein as follows, to-wit:

By Mr. German: As Government's Exhibit No. 1, we offer in evidence a certified copy of the census card of Barney Thlocco from the office of the Dawes Commission.

By the Court: Let it be identified as it is offered.

By Mr. Stuart: No objection.

By the Court: It may be admitted.

By Mr. German: This shows, Your Honor, that the name of Barney Thlocco appears opposite Roll No. 8592, listed as of May 24, 1901, on May 24, 1901. I don't suppose the descriptive feature is important. It has a notation on it, a notation with reference to the striking of the name from the roll which we will offer evidence on later.

The said Exhibit No. 1, is in words and figures as follows:

[See insert herewith for photographic reproduction of Government's Exhibit No. 1, marked page 38½.]

Gov. Ex. 1. 2017 Eq. 5/5/15

RESIDENCE: _____

POST OFFICE: _____

Arbuka, Ind. Ter.

Or

Dawes' Roll No.	NAME.	Re's Pe first Named	AGE	SEX.	BLOOD.	TRIBAL EN	
						Year.	
8592	<i>Thlocco, Barney</i>		35	M	Full	1890	<i>Arbuka</i>
	2						
	3						
	4						
	5						
	6						
	7						
	8						
	9						
	10						
	11						
	12						
	13						
	14						
	15						
	16						
	17						
	18						

*741
W.S.
Wildcat*

SITIZP. CERT'P
ISSUED FOR No 1 & 2

JUN 25 1902

EN
OF NOS. 83
APPRGY
OF INTERIO

*No. 1 on
No. 1 on
No. 1 on
mission*

CARD NO. 3021
FIELD NO. 3456

ENROLLMENT.		TRIBAL ENROLLMENT OF PARENTS.							
Town	No.	Name of Father.	Year.	Town	District	Name of Mother.	Year.	Town	District
abatchew	755	Atishat Amashit	1895	Atishat	1895	Atishat	1895	Atishat	1895

ROLLMENT

2 BY THE SECRETARY

March 28, 1909

Enrollment Case 935

go Roll as "Piney Shloco"

1905 Pay Roll No. 443.

ken from approved roll by authority of Department Dec 13, 1906 (L. D. L. 734-1906). Com.

's file no. 55241-1906.

Date of Application
for Enrollment

May 24 1901



Department of the Interior, Office of Superintendent for the
Five Civilized Tribes, Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes of Indians and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of Creek Indian census card No. 3021.

(Signed)

GABE E. PARKER,

Superintendent for the Five Civilized Tribes.

May 3, 1915. C. H. D.

By Mr. German: We now offer as Government's Exhibit No. 2 a certified copy of the roll in so far as it shows the name of Barney Thlocco.

The said Exhibit No. 2 is in words and figures as follows:

Gov. Ex. 2.

2017, Eq.—5/5/15.

Creek Roll, Indians by Blood.

Number.	Name.	Age.	Sex.	Blood.	Card No.
8592.	Thlocco, Barney.	35	M.	Full	3021

Stricken by order of Department, Dec. 13, 1906, (I. T. D. 22734-1906) Commissioner's File No. 55241-1906.

Department of the Interior, United States Indian Service, Office of Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the approved rolls of the citizens or members of the Five Civilized Tribes of Indians, and that the above and foregoing is a true and correct copy of that portion of one of said rolls as above described, covering the persons enrolled opposite the numbers indicated.

(Signed)

GABE E. PARKER,

Superintendent for the Five Civilized Tribes.

W. S. S. May 3rd, 1915.

[CLERK'S NOTE.—In the above exhibit the words "Thlocco Barney, 35, M., Full, 3021," have red lines running through the same.]

By the Court: Has that a notation on it in reference to the action of the Commission in 1906?

By Mr. German: It has.

By Mr. Stuart: We object to the notation of 1906 because it has no bearing on this branch of the controversy.

By the Court: I will hear you in support of the offer.
Whereupon argument was submitted to the court.
Whereupon an adjournment was taken until 2:00 o'clock P. M.

And thereafter court convened at 2:00 o'clock P. M. pursuant to adjournment and argument of counsel was resumed.

By the Court: This is a very important feature in this case and the determination of it in one way or the other will affect the case materially. I am going to take the night before I finally announce my rulings on the objection. Court will take a recess until tomorrow morning at 10:00 o'clock.

Whereupon court adjourned until 10:00 o'clock tomorrow morning.

And thereafter court convened at 10:00 o'clock May 6th, 1915, and the following proceedings were had:

By the Court: In the matter which was argued at length yesterday, gentlemen, involving the objection offered to the introduction of evidence in relation of the action of the Secretary in December, 1906, in attempting to strike the name of Barney Thlocco from the rolls, I have reached the conclusion that the objection is well taken. The finding of the Commission, as suggested yesterday, and judgment of the Commission, pursuant to which Barney Thlocco was enrolled, involved the finding that he had all the qualifications necessary to become an enrolled member of the Creek Tribe for the purpose of the distribution of this estate and allotment among the members of the tribe. In my judgment it was just as essential that the Commission investigate and determine the fact as to whether he was alive April 1, 1899, as it was that they determined that he had Indian blood or any of the other qualifications necessary to entitle him to enrollment. The very foundation of the title which the allottees in the Creek Tribes and other tribes get is the allottee's enrollment on the rolls of the tribe made pursuant to Acts of Congress for the very purpose of determining who were entitled to partake in the distribution of these lands and funds. The bill shows that Barney Thlocco was enrolled as a member of the Creek Tribe, which carries with it an allegation that the Commission adjudged that he was qualified for enrollment, not only by virtue of his blood but also by virtue of the fact that he was living on April 1, 1899; because the Commission were not permitted to enroll even members of Creek blood under the law unless they were alive April

1, 1899. Pursuant to this enrollment, judgment and finding by the Commission the certificate of allotment was issued and patent was issued. Of course this imports that the Secretary of the Interior prior to the issuance of the allotment certificate and patent had approved the enrollment. When the patent was issued he approved the patent. It is alleged in the bill that by reason of the recordation of this patent in the office of the Commission to the Five Civilized Tribes it has become a cloud upon the title. It is alleged in the answer that this patent was recorded with the Commission to the Five Civilized Tribes. I think, as held

the Supreme Court in the Skelton-Dill case, that even assuming as the pleadings show, that when the patent was issued and the allotment certificate was issued Barney Thlocco was dead; by operation of law although the allotment certificate and it issued in his name, by operation of law, the legal title to the land by virtue of the patent vested in his heirs. And that by recordation of that patent the legal title passed. Now after that, if that patent is then clearly after that the Secretary of the Interior could not more invalidate that patent and that title or affect it by proposing to strike Thlocco's name from the roll, than he could invalidate a patent issued for public lands in the administration and distribution of the public lands under his charge, after patent had been issued, by reviewing some action of the Land Office which was prerequisite to issuance of the patent. It seems to me that the Secretary of the Interior after this patent was issued to Barney Thlocco, if he has a right in assuming that by operation of law it carried the legal title to the land to these heirs, it seems to me that by the issuance of this patent with the effect that it had, the Secretary was absolutely without authority so far as these particular lands are concerned, to require any further investigation or finding in an attempt to affect the title. It is suggested that there are still tribal funds for distribution. That in my judgment, is another question. The Secretary, as appears from the proof offered here and allegations made in the bill, has attempted to strike the name from the rolls. When the tribal funds come to be distributed and these heirs shall insist on their part of whatever tribal funds are now undistributed, together with other members of the tribe or other persons entitled to a distribution, that question will arise. It is not necessary to determine that here. It seems to me that the lands, inasmuch as they have been distributed by this patent, are in an entirely different class. I think the only place that that judgment of the Commission can be attacked is in a court with jurisdiction to consider it on either the ground that it was procured by fraud or in such a way as to amount to gross mistake of law or fact or gross mistake of law and fact on the part of the Commission. It is charged in the bill here that the Commission acted arbitrarily in making this enrollment, and without any evidence whatever as to whether Barney Thlocco was alive or dead April 1, 1899. In prior consideration of this matter, coming up on, I think, a motion to dismiss, I overruled the motion and held that if it were a fact that the Commission acted without any evidence whatever, that judgment would amount to a gross mistake of fact and law, and it, in my judgment, leaves the case here and the bill alleging that the Commission acted without any evidence whatever. In my judgment it devolves (upon) the Government to establish, to make a *prima facie* case, as to that and to also show that Thlocco was not entitled to enrollment in order to succeed. The objection will be sustained and exception noted.

By Mr. German: Yes, Your Honor, we save an exception.

By Mr. Davidson: Might I ask the court one question? It may be necessary for us to have a clear idea of that in offering our proof.

Do I understand that the court holds that the action of the Secretary is a void act?

By the Court: So far as this land is concerned in my judgment it has no place in this hearing.

By Mr. Davidson: Now does that depend upon the want of notice?

By the Court: No, regardless of the question of notice. I think the Secretary after this patent was issued, so far as these lands—so far as this case is concerned was without authority to strike the name from the roll and thereby invalidate the patent and title, the very thing which is sought to be done by this action here.

By Mr. Davidson: For the reason that the acts of 1906 cured the trouble and operated to vest the title?

By the Court: In view of the various acts of Congress which I think pertain to this case the title passed to the heirs notwithstanding Thlocco was dead at the time the patent issued.

By Mr. Linebaugh: Following out the argument that we presented to the court, and at the proper time in the submission of our proof to make our record in this case, we would desire to present further observations on the question touched upon in argument, and that is that if Barney Thlocco was dead on April 1, 1899, then the Commission was without jurisdiction to enroll him. Further, that if he was dead at the time of the execution of the patent then the Commission and the Secretary under the law *was* without jurisdiction—making the allotment and executing the patent, *was* without jurisdiction to make the allotment to him and execute the patent to him.

43 I assume that in making our offers that question will probably present itself.

By the Court: Well, that was presented generally yesterday, yes.

By Mr. German: Your honor, may I inquire to what extent the ruling in sustaining the objection applies to the evidence which was offered. It was a certified copy of the roll, if you remember.

By the Court: Well, you alleged that he was enrolled by the Commission. That is admitted by the answer so that stands an admitted fact in this case that he primarily was enrolled. The objection to this Exhibit No. 2 which was offered, is sustained because there is a notation showing the name as stricken from the roll by action of the Secretary in 1906.

W. H. ANGELL produced and sworn as a witness on behalf of the complainant testified substantially as follows:

Direct examination of W. H. Angell:

My name is W. H. Angell. I am in charge of the land division in the office of the Superintendent for the Five Civilized Tribes, and for the last sixteen years have held numerous positions in the Indian office at Muskogee, being connected with the work of the Dawes Commission during that time. In the year 1902 beginning the latter part of June I had charge of the Creek enrollment division, and prior to that time I was connected with the allotment work, and in 1902 was familiar with the work of allotting lands to Creek citizens. I am

w in custody, subordinate to the Superintendent, of the records
 taining to the allotment of lands in the Creek Nation. There
 re allotments arbitrarily made in the Creek Nation and one can
 ermine from the records whether a particular allotment was ar-
 rarily made.

Government's Exhibit No. 3 is a certified copy of the instrument
 der which the allotment described in it was made.

By Mr. German: We offer this in evidence as Government's Ex-
 hit No. 3.

By the Court: If there is no objection it may be admitted.

By Mr. Stuart: I don't think so.

By the Court: It may be admitted.

Said Exhibit No. 3 is in words and figures as follows:

[See insert herewith for photographic reproduction of Government's Exhibit No. 3, marked page 44½]

tract Book
page 412 | 30/6/02

Gov. Ex #3
5-6-15 no 2012

DEPARTMENT
COMMISSIONER ~~TO~~

Muskogee

Allotments of land and homestead designations
the Resolution of the Commission

Certificate		NAME	Allotment - Subdivision of HOMESTEAD	Sec.	Twp.
No.					
2	16986	Barney Phlocco	NW 4	9	18

Dated at Muskogee Indian Territory, this 20
of June 1902

(over)

no 20/2

50 A
EM-3-31-99

~~CHEROKEE~~ LAND OFFICE.

stead designations as hereinafter described, are hereby
~~commission~~ adopted May 24,

[illegible]

his 20

day

ver)

This is to certify that I am the
records pertaining to the enro
Choctaw, Chickasaw, Chero
es of Indians and the dispos
es, and that the above and for
copy of an arbitrary allotme
to the Five Civilized Tribes
cco, Creek by blood, Roll Num
Ryan, Acting Commissioner

ILIZED TRIBES.

741
U.S.
v.
Wheat }

CAD

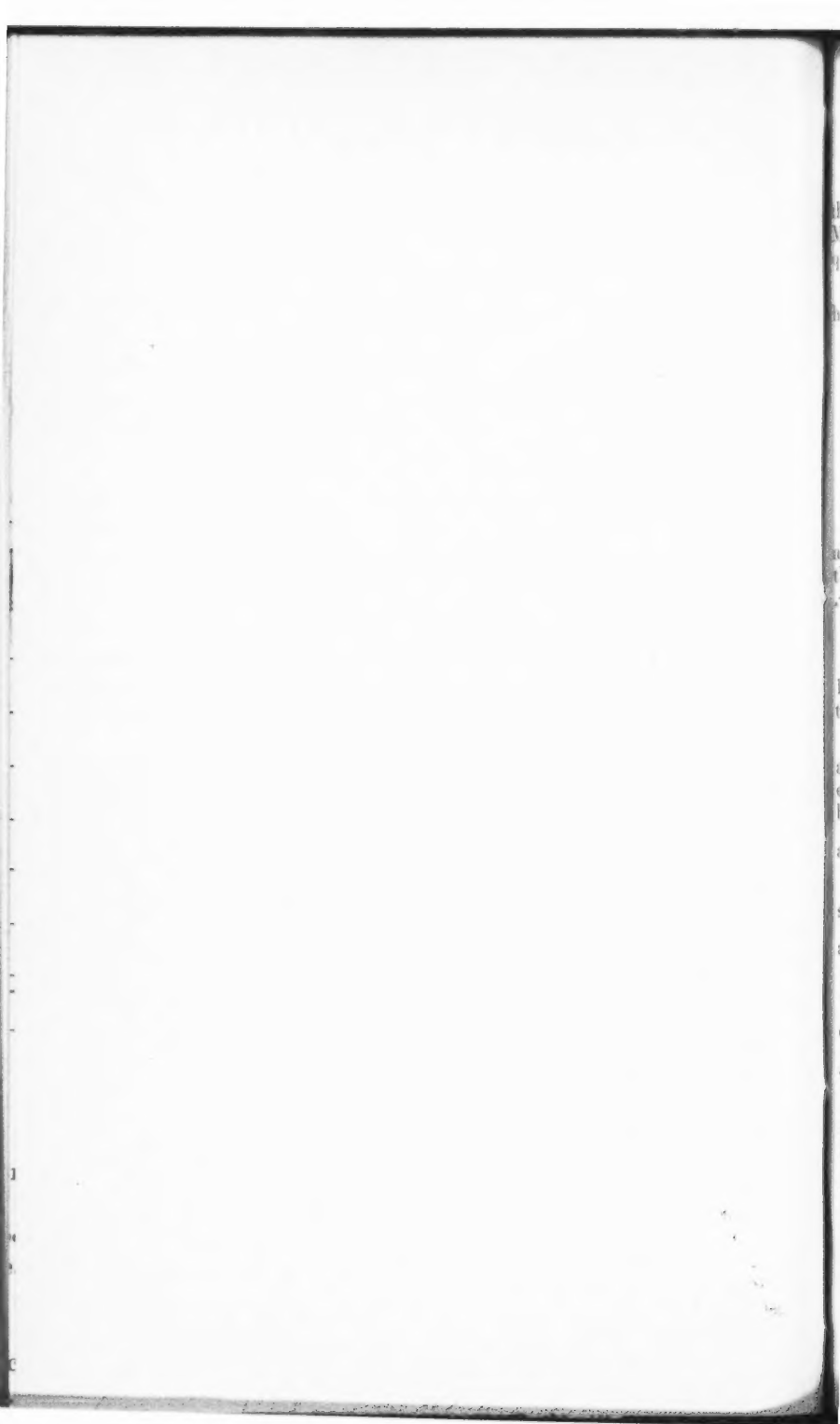
made to the following named persons; *in accordance with*

902 ~~2025~~ ²⁰²⁵ Vign

[illegible]

James Birby
acting Chairman

officer having custody of
ment of the members of
e, Creek and Seminole
ion of the land of said
going is a true and cor-
made by the Commis-
in the name of Barney
r 8592, on June 30, 1902.
to the Five Civilized



the Witness: Government's Exhibit No. 4 is a certified copy of resolution passed by the Commission to the Five Civilized Tribes May 24, 1902, and is the resolution under which the allotment in question was made.

Mr. German: We offer this resolution as Government's Exhibit No. 4.

by the Court: It may be admitted.

and Exhibit No. 4 is in words and figures as follows:

Gov. Ex. No. 4.

5/6/15.

MUSKOGEE, INDIAN TERRITORY, May 24, 1902.

session of the Commission to the Five Civilized Tribes was held at its general office at Muskogee, Indian Territory, on the above date, there being present commissioners Bixby, Needles and Breckenridge.

* * * * *

Whereas, section three of the Act of Congress approved March 3, 1901 (31 Stat., 861), known as the Creek Agreement, provides

All lands of said tribe except as herein provided shall be allotted among the citizens of the tribe by said Commission so as to give to each citizen an equal share of the whole in value as nearly as may

that

* * * there shall be allotted to each citizen one hundred and forty acres of land,"

Whereas, section seven of said act provides that,

* * * each citizen shall select from his allotment forty acres of land as a homestead"

that

* * * if for any reason such selection shall not be made for any citizen, it shall be the duty of said Commission to make selection for him."

and, Whereas, numerous citizens of said nation have made no selection of land for allotment and others have made selections of only a portion of the land to which they are entitled, and Whereas, after due notice given, many citizens of said nation have failed to make a selection of a homestead, therefore, be it

Resolved, That the Acting Chairman is hereby authorized and empowered by and on behalf of the Commission to allot to each citizen his share of the lands of the Creek Nation not heretofore allotted or selected

such an amount of land of at least average quality as will make the total allotment of each citizen one hundred and sixty acres, and to select a homestead for such citizens in all cases where a selection of a homestead has not been made by or on behalf of said citizen:

Provided, that the allotment and selection of homestead so made for a citizen shall include improvements shown by the plats or records of the office to belong to said citizen."

On motion of Commissioner Breckenridge, duly seconded, the same was unanimously adopted.

* * * * *

There being no further business before the meeting the Commission on motion was adjourned.

TAMS BIXBY,
Acting Chairman.

Attest:

A. L. AYLESWORTH, *Secretary.*

Department of the Interior, Office of Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians and the disposition of the land of said tribes and that the above and foregoing is a true and correct copy of the proceedings of the Commission to the Five Civilized Tribes, of May 24, 1902, in so far as same relates to the adoption of a resolution by said Commission, authorizing and empowering the Acting Chairman of said Commission to make allotments of land to each citizen of the Creek Nation who had not theretofore selected any land in allotment or had incomplete allotments.

GABE E. PARKER,
Superintendent for the Five Civilized Tribes.

May 1, 1915.
C. H. D.

By the Witness: There is another way that one can tell whether the allotment was arbitrarily made. It is a notation on the census card, that notations consists in the letter "L," that notation indicates that an arbitrary allotment was made in that case. The allotment here in question was arbitrarily made, that is, no application was made to allot these lands, except one by the Commission. I have the patents issued in this case and Government's Exhibit No. 5 is the patent to the homestead allotment of forty acres that was issued in the name of Barney Thlocco, and Government's Exhibit No. 6 is the patent issued to Barney Thlocco covering the land allotted to him as surplus allotment.

By Mr. German: We offer Government's Exhibits Nos. 5 and 6.
By Mr. Stuart: We have no objection, Your Honor, except that there appears to be a cancellation on the face of the patents.

y the Witness: The matter written across the face of each of Exhibits Nos. 5 and 6 "Cancelled by decision of the U. S. Court the Eastern District of Oklahoma rendered July 29, 1911, from which no appeal was taken" was placed there after the decree rendered in this court in the case of the United States vs. the Unknowns of Barney Thlocco, which has been set aside.

y Mr. German: We do not offer that statement.

y the Court: It is not contended that that decree has any bearing in this case.

y Mr. German: In view of the vacation of that decree.

y the Court: Then those exhibits will be admitted, except that portion will not be considered as a part of the evidence.

Government's Exhibit No. 5 is in words and figures as follows:

Gov. Ex. 5.

Eq. 2017.—5/6/15.

Homestead Deed. (39A.) Creek Indian Roll No. 8592.

The Muskogee (Creek) Nation, Indian Territory.

All Whom These Presents Shall Come, Greeting:

Whereas, By the Act of Congress approved March 1, 1901 (31 Stat., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed, and

Whereas, the said Commission to The Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of Barney Thlocco, a citizen of said tribe, as a homestead.

Now, therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Barney Thlocco all right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation and to the following described land, viz:

The southeast quarter of the northwest quarter of section nine (9), Township eighteen (18) north, and range seven (7) east

the Indian Base and Meridian, in Indian Territory, containing forty (40) acres, more or less, as the case may be, according to the

United States survey thereof, subject, however, to the conditions provided by said Act of Congress and which conditions are that said land shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years; and subject, also, to the provisions of said Act of Congress relating to the use, devise and descent of said land after the death of the said Barney Thlocco; and subject, also, to all provisions of said Act of Congress relating to appraisement and valuation and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 11th day of March, A. D. 1903.

[SEAL.]

P. PORTER,

Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior, Approved Apr. 3, 1903, Ethan A. Hitchcock, Secretary, by Oliver A. Phelps, Clerk. L. R. S.

[Endorsed across face:] Cancelled by decision of the U. S. Court for the Eastern Dist. of Oklahoma rendered July 29, 1911, from which no appeal was taken.

(On back:) Commission No. 9450. Homestead Deed—(39A). Muskogee (Creek) Nation to Barney Thlocco Indexed. Compared.

48 Filed for record on the 11 day of April, 1903, at 11 o'clock A. M., and recorded in Book 6. Page 508. ———, Commissioner to the Five Civilized Tribes, by T. B. Needles, Commissioner. File No. 4624. Department of the Interior. Received Mar. 31, 1903. Enc. No. — of No. —, Indian Territory Division.

Government's Exhibit No. 6 is in words and figures as follows:

Gov. Ex. 6.

Eq. 2017.—5/6/15.

Allotment Deed. (40A.) Creek Indian Roll No. 8592.

The Muskogee (Creek) Nation, Indian Territory.

To All Whom These Presents Shall Come, Greeting:

Whereas, By the Act of Congress approved March 1, 1901 (31 Stats., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed, and

Whereas, the said Commission to The Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described

been selected by or on behalf of Barney Thlocco a citizen of the Muskogee (Creek) Nation, as an allotment, exclusive of a forty-acre homestead, as aforesaid,

Now, therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Barney Thlocco all right, title and interest in the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following described land, viz:

The west half of the northwest quarter, and the northeast quarter of the northwest quarter of section nine (9), township eighteen (18) north, and range seven (7) east,

the Indian Base and Meridian, in Indian Territory, containing one hundred and twenty (120) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to all provisions of said Act of Congress relating to appraisal and valuation and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 11th day of March, A. D. 1903.

[SEAL.]

P. PORTER,

Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior, Approved Apr. 3, 1903. Ethan A. Hitchcock, Secretary. By Oliver A. Phelps, Clerk. L. R. S.

[Endorsed across face:] Cancelled by decision of the U. S. Court of the Eastern Dist. of Oklahoma rendered July 29, 1911, from which no appeal was taken.

(On back:) C8592. Commission No. 9451. Allotment Deed—(O.A.) Muskogee (Creek) Nation to Barney Thlocco Indexed compared. Held up. Filed for record on the 11 day of April, 1903, at 11 o'clock A. M., and recorded in Book 7, Page 508. —, Commissioner to the Five Civilized Tribes, by T. B. Needles, Commissioner. File No. 4624. Department of the Interior. Received Mar. 31, 1903. Enc. No. — of No. — Indian Territory Division.

By the Witness: Those patents after they were recorded in the office of the Commission were delivered to the Principal Chief of the Creek Nation for delivery to the allottee. There then arose a question as to whether or not Barney Thlocco was entitled to an allotment and the patents were recalled from his office and placed in our files, where they have been ever since, and they have not been delivered. They were the only patents that were ever issued pursuant to the allotment made in the name of Barney Thlocco.

On cross-examination W. H. ANGELL testified substantially as follows:

There were a great many full-blooded Creeks who did not select or apply for their allotments and where that was true the Commission made selections for them. The purpose of delivering these patents to the chief of the Creek Nation after they had been recorded was so that he could transmit them by mail, or some other method of actual delivery, to the allottee.

On redirect-examination said witness testified that the reason for making arbitrary allotments was because there were persons
50 enrolled who had not appeared to make application for their allotment.

Witness excused.

And thereupon J. E. KIRKBRIDE being called on behalf of the Government was sworn and under oath testified substantially as follows:

Direct examination:

My name is J. E. Kirkbride. I am acquainted with what is known as the Barney Thlocco allotment in the Creek Nation and I saw said lands on the 3rd day of November, 1913, which was prior to their occupancy for the purpose of developing them for oil and gas purposes. The 160 acres of said allotment is in a body and said lands were not, to my knowledge, at that time occupied.

"Q. We- there any improvements on the land? A. No, sir."

By Mr. Stuart: Your Honor, I cannot see the materiality of this and I object to it.

By the Court: Well, I do not see it just now myself. I will hear you.

By Mr. German: Your honor, the object of this testimony is to prove that the lands have never been taken possession of by the alleged heirs of Barney Thlocco or any one claiming under this patent, at least, prior to the time that the Secretary cancelled the enrollment and prior to the time that the Government made the attack in this case.

By the Court: I don't think that the question whether the parties had possession or not would be material if the court is correct in the holding that the legal title passed; the Government can not complain because possession was not taken.

By Mr. German: We except.

By the Court: Exception noted.

By Mr. German: We offer to prove by this witness that the lands were unoccupied; unimproved, and had not been occupied by fencing, houses, nor had they been tilled or in any other manner occupied or in the possession—physical possession of any person prior to the time that the cancellation order was made by the Secretary of the Interior in December, 1906, or prior to the time of the attack by the Government in this court in this case.

By the Court: The record may show the offer.

By Mr. Stone: And our objection, Your Honor——

51 By Mr. German: Yes, sir. We except to the court's ruling in excluding and refusing to permit us to make that proof.

By the Court: Exception noted.

By Mr. Davidson: Was the record made clear that *that* counsel for the defendants object to the offer?

By Mr. Stone: We do.

By the Court: I understand they object to the offer for the same reason as objection was made to the question last ruled to which the court sustained the objection.

By Mr. German: And the Government excepts.

By the Court: Exception noted.

By Mr. German: That is all, Mr. Kirkbride.

Witness excused.

W. H. ANGELL being recalled on behalf of the Government further testified substantially as follows on direct examination:

Since testifying awhile ago I have ascertained the date on which the patents in question were returned to the Dawes Commission by the Creek Chief, it was August 31, 1904.

"Q. Were those recalled by the Commission? A. The notation on the record in the chief's office reads in this way: 'Hold up, Mott, National Attorney; return to D. Commission, 8/31/'04.'

Q. 'Return to D. Commission,' evidently standing for Dawes Commission? A. Yes, sir; and in red, 'Stricken from approved roll, December 13, 1906, Commission File No. 55,241, 1906.'"

By Mr. Stuart: We move to strike the answer for the same reason that the other evidence in regard to the action of the Secretary in December, 1906, has been excluded.

By the Court: The motion is sustained and exception noted, that is merely as to the notation on the chief's records.

By Mr. German: Pertaining to the cancellation.

By the Court: Pertaining to the cancellation in 1906.

Witness excused.

By Mr. German: We now offer in evidence as Government's Exhibit No. 7, the records of the Commissioner to the Five Civilized Tribes pertaining to the institution of proceedings in that office looking toward the cancellation of the enrollment of the name

52 Barney Thlocco and cancelling said enrollment, which records consist of the following instruments, briefly stated:

A letter written by the Chairman of the Commission to the Five Civilized Tribes to the Secretary of the Interior, dated August 24th, 1904. A letter dated September 7, 1904, from the Commissioner of Indian Affairs to the Secretary of the Interior. Affidavits dated August 9, 1904, signed and sworn to by Wilson Knight and Barney Yahola, pertaining to the date of the death of Barney Thlocco. A letter dated September 16, 1904, from the Secretary of the Interior to the Commission to the Five Civilized Tribes. The testimony of

Jonas Bear taken October 21, 1905, after the matter of the settlement of Barney Thlocco had, in the year 1904, been re-opened which pertains to the date of the death of Barney Thlocco. testimony of Charlie Simer given on November 14, 1905, in the same matter and pertaining to the same matter. A notice dated February 9, 1906, addressed by the Acting Commissioner to the Five Civilized Tribes—addressed to the heirs of Barney Thlocco giving notice of the opening of the case and the hearing thereon. A letter dated October 10, 1906, from the Commission to the Five Civilized Tribes to the Secretary of the Interior. A letter dated December 13, 1906, from the Secretary of the Interior to the Commission to the Five Civilized Tribes.

Said Exhibit No. 7, consisting of nine documents, is in word and figures as follows:

Refer in reply to the following:

Gov. Ex. 7.

2017, Eq.—5/6/15.

Department of the Interior, Commission to the Five Civilized Tribes.

MUSKOGEE, INDIAN TERRITORY, August 25, 1906.

The Honorable, the Secretary of the Interior.

SIR: The name of Barney Thlocco is contained in the partition of citizens by blood of the Creek Nation, approved March 28, 1899, No. 8592.

August 9, 1904, the Attorney for the Creek Nation delivered to the Commission for transmission to the Department, a communication in the nature of a motion to reopen the case, and an affidavit executed by Wilson Knight and Barney Yahola relative to the death of Barney Thlocco. It appears from said affidavit that Barney Thlocco died prior to April 1, 1899.

53 It is recommended that the case be reopened and that a hearing be ordered.

The communication from the Creek attorney and affidavit of Wilson Knight and Barney Yahola are inclosed for Departmental consideration.

Respectfully,

TAMS BIXBY, *Chairman*

Through the Commissioner of Indian Affairs.

D. C. S. 2—25/04.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, the disposition of the land of said tribes, and that the above and going is a true and correct copy of a letter press copy, dated August 25, 1906.

25, 1904, addressed to the Secretary of the Interior and signed by Tams Bixby, Chairman, in the matter of the enrollment of Barney Thlocco, citizen by blood of the Creek Nation, Roll No. 8592.

THOS. RYAN,
Acting Commissioner to the Five Civilized Tribes.

Muskogee, Oklahoma, October 28, 1910.

Refer in reply to the following:

Land: 58606-1904; 59020-1904.

Department of the Interior, Office of Indian Affairs.

WASHINGTON, September 7, 1904.

The Honorable the Secretary of the Interior.

SIR: There is enclosed a report from the Commission to the Five Civilized Tribes dated August 25, 1904, concerning the application of the attorney for the Creek Nation in the matter of the reopening of the enrollment case of Barney Thlocco whose name appears upon the approved partial rolls opposite No. 8592.

There is enclosed a communication from the attorney for the Creek Nation dated August 9, last, transmitting the affidavit of Wilson Knight and Barney Yahola, wherein they state that they personally knew that said Thlocco died prior to April 1, 1899. From the communication of Mr. Mott it would appear that deeds numbered 9450 and 9451 have been issued in favor of said deceased citizen or his heirs. Mr. Mott's communication of the Commissioner's report does not show whether said deeds have been approved by the

Department and delivered to the heirs of the deceased citizen.

However, from the affidavit enclosed it seems that the Creek Nation should be given an opportunity to introduce testimony concerning the death of Barney Thlocco, and it is respectfully recommended that the case be re-opened, provided the deeds mentioned have not been approved and delivered to the heirs of the deceased citizen. If such action has been taken. The Commission should make further report to the Department and not take any action concerning the re-opening of said case or the introduction of additional testimony until they have been further instructed in the premises.

Very respectfully,

W. A. JONES, *Commissioner.*

G. A. W.-D.

This is to certify that I am the officer having the custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of a copy of letter from the Commissioner of Indian Affairs to the Secretary of the Interior dated

September 7, 1905, relative to the enrollment case of Barney Thlocco deceased, Creek by blood, roll No. 8592.

THOS. RYAN,
Acting Commissioner to the Five Civilized Tribes
L.

Muskogee, Oklahoma, October 28, 1910.

Copy of a Copy.

MUSKOGEE, I. T., August 9, 1904.

Personally appeared before me Wilson Knight and Barney Yahola and after being duly sworn say that they knew personally Barney Thlocco, and that he died prior to April 1, 1899.

(Signed)

(his
WILSON x KNIGHT.
mark)

(Signed)

(his
BARNEY x YAHOLA.
mark)

Witnesses:

CHARLES H. SAWYER.
WM. HEARD.

Subscribed and sworn to before me this 9th day of August, 1904.
[SEAL.] (Signed) CHARLES H. SAWYER,
Notary Public.

My Commission expires Oct. 28, '06.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of a copy of affidavits made by Wilson Knight and Barney Yahola relative to the date of the death of Barney Thlocco, Creek by blood, Roll No. 8592.

THOS. RYAN,
Acting Commissioner to the Five Civilized Tribes
L.

Muskogee, Oklahoma, October 28, 1910.

Department of the Interior.

WASHINGTON, September 16, 1904.

Commission to the Five Civilized Tribes, Muskogee, Indian Territory.

GENTLEMEN: The Department is in receipt of your communication of August 25, 1904, transmitting a motion signed by M. L. Mott, attorney for the Creek Nation, to re-open the Creek enrollment case of Barney Thlocco, and certain affidavits in support of

said motion from which it appears that said Barney Thlocco died prior to April 1, 1899. You report that said Barney Thlocco's name appears on the partial list of citizens by blood of the Creek Nation approved March 28, 1902, No. 8592.

It appears from said communication that deeds No. 9450 and 9451 have been issued in favor of said deceased citizen or his heirs.

Reporting September 7, 1904, the Commissioner of Indian Affairs recommends that the case be re-opened and that you be directed to order a rehearing, providing the deeds mentioned have not been approved and delivered to the heirs of the deceased citizen. That if said deeds have been delivered you should make further report to the Department and not take any action concerning the re-opening of said case or the introduction of additional testimony until you have been further instructed in the premises. Copy of his letter is enclosed.

The Department does not believe that the question as to whether or not deeds have been issued to the deceased or his heirs should be considered in connection with the motion for rehearing inasmuch as deeds to the land constitute only a portion of the benefits incidental to Creek citizenship. If the name of the deceased appears on the roll erroneously the error should be corrected. The motion for rehearing is therefore granted and you will so notify the parties concerned.

Respectfully.
(Signed)

THOS. RYAN,
Acting Secretary.

1 inclosure.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of a copy of Departmental letter dated September 16, 1904, relative to reopening the enrollment case of Barney Thlocco, Creek by blood, roll No. 8592.

THOS. RYAN,
Acting Commissioner to the Five Civilized Tribes.
L.

Muskogee, Oklahoma, October 28, 1910.

En. 935.

Department of the Interior, Commissioner to the Five Civilized Tribes.

OKEMAH, I. T., October 21, 1905.

In the Matter of the Enrollment of Barney Thlocco, Deceased, as a Citizen by Blood of the Creek Nation.

JONAS BEAR, being duly sworn, testified as follows:

Through Alex Posey, Official Interpreter.

By the Commissioner:

Q. What is your name?

A. Jonas Bear.

Q. How old are you?

A. Thirty.

Q. What is your post office address?

A. Okemah.

Q. Are you a citizen of the Creek Nation?

A. Yes, sir.

Q. To what town do you belong?

A. Greenleaf.

Q. Did you know Barney Thlocco?

A. Yes, sir, I was well acquainted with him.

Q. Do you know to what town he belonged?

A. I think he belonged to Tuckabatche.

Q. Do you know the date of his death?

A. Not exactly, but I know about when he died.

Q. About when did he die?

A. He died sometime in January or February, 1899, at the time so many people died of smallpox. He died in the pest camp at Hilla-bee Hutche, but before I was taken there.

Q. When were you taken to the pest camp?

A. On April 3, 1899. Barney Thlocco had been dead about two months at that time. The smallpox was most fatal during the months of January and February, and it was then that he died. The disease was pretty well under control at the time I was taken to the pest camp.

Q. Do you know how old he was at the time of his death?

A. I judged him to be about forty years old.

Q. Did he have a family?

A. Yes, sir, but his entire family died of the smallpox.

Q. Do you remember the circumstance of the opening of the Creek Land Office?

A. I do.

Q. Are you positive that he died before the opening of the Creek Land Office?

A. Yes, sir.

D. C. Skaggs, on oath state that the above and foregoing is a true and true transcript of my stenographic notes as taken in said case on said date.

D. C. SKAGGS.

Subscribed and sworn to before me this 2 day of Jan. 1906.

[SEAL.]

ALEX POSEY,
Notary Public.

E.H. En. 835.

Department of the Interior, Commissioner to the Five Civilized Tribes.

PRICE, I. T., November 14, 1905.

the Matter of the Enrollment of Barney Thlocco, Deceased, as a Citizen by Blood of the Creek Nation.

CHARLEY SIMMER, being duly sworn, testified as follows:

Through Alex Posey, Official Interpreter:

By the Commissioner:

Q. What is your name?

A. Charley Simmer.

Q. What is your age?

A. I was about ten years old during the Ispahchehe insurrection.

Q. What is your post office address?

A. Okemah.

Q. Are you a citizen of the Creek Nation?

A. Yes, sir.

Q. To what town do you belong?

A. Fish Pond. I am a member of the house of Warriors for that town.

Q. Do you know Barney Thlocco?

A. I was well acquainted with him. He was a member of Tuckache town.

Q. Do you know when he died?

A. He died of the smallpox in the pest camp, at Hillabee Hutche, the latter part of December, 1898, or in the early part of January, 1899. He was among the first victims of the smallpox epidemic. His brother, Mejessie, died of the same disease, in January, 1899, together with his entire family, and Barney Thlocco died before he died.

Q. How old was he?

A. He was probably forty years old.

Q. Did he have a family?

A. He had a wife and two children. A son about eighteen and a daughter who was younger.

Q. What was the name of his wife?

A. Haga.

Q. Do you know to what town she belonged?

A. No, sir.

Q. What were the names of his children?

A. His son's name was Chanefee. I have forgotten the name of his daughter.

Q. Did his wife and two children also die of the smallpox?

A. Yes, sir, I knew Barney Thlocco and his family when they lived in the Cherokee Nation. They removed there during the Ispahche War, and lived there for some time. I had relatives in the Cherokee Nation and was also living there.

Q. Are you positive that he died in either December, 1898, or January 1899?

A. Yes, sir.

Q. Do you remember the circumstance of the opening of the Creek Land Office?

A. Yes, sir.

58 Q. Did he die before or after the opening of the Creek Land Office?

A. He died before.

I, D. C. Skaggs, on oath state that the above and foregoing is a full and true transcript of my stenographic notes as taken in said cause on said date.

D. C. SKAGGS,

Subscribed and sworn to before me this 2 day of January, 1906

[SEAL.]

ALEX POSEY,

Notary Public.

Refer in reply to the following:

Copy.

Department of the Interior, Commissioner to the Five Civilized Tribes.

MUSKOGEE, INDIAN TERRITORY, February 9, 1906.

To the Heirs of Barney Thlocco, Arbeka, Indian Territory.

GENTLEMEN: October 1, 1904, the Secretary of the Interior reopened the case of Barney Thlocco for a rehearing, on motion of the attorney for the Creek Nation accompanied by affidavits to the effect that said party died prior to April 1, 1899.

You are hereby advised that on February 19, 1906, at 9 o'clock A. M. at the office of the Commissioner to the Five Civilized Tribes in Muskogee, Indian Territory, the matter of the right to enrollment of said Barney Thlocco, deceased, will be investigated.

The attorney for the Creek Nation has been notified of said re

hearing and that he will be given an opportunity to introduce evidence at said time and place.

Respectfully,
(Signed)

WM. O. BEALL,
Acting Commissioner.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of a letter of the Acting Commissioner to the Five Civilized Tribes dated February 9, 1906, notifying the heirs of Barney Thlocco, deceased, that a hearing would be had at the office of the Commissioner to the Five Civilized Tribes in the matter of the right to enrollment of Barney Thlocco, Creek by blood, Roll number 8592.

THOS RYAN,
Acting Commissioner to the Five Civilized Tribes.
L.

Muskogee, Oklahoma, October 28, 1910.

59 Cr. En. 935.

MUSKOGEE, INDIAN TERRITORY, October 10, 1906.

The Honorable The Secretary of the Interior.

SIR: August 25, 1904, the Commission to the Five Civilized Tribes transmitted to the Department a communication from the attorney for the Creek Nation in the nature of a motion to reopen the matter of the right to enrollment of Barney Thlocco, deceased, whose name is contained in a partial list of citizens by blood of the Creek Nation approved by the Secretary of the Interior March 28, 1902, opposite No. 8592. Said motion was accompanied by an affidavit executed by Wilson Knight and Barney Yahola to the effect that said Barney Thlocco died prior to April 1, 1899.

The Commission to the Five Civilized Tribes, in its report transmitting said motion and affidavit, recommended that the case be reopened and that a hearing be ordered.

September 16, 1904 (I. T. D. 7234-1904), the Department reopened said case and referring to the fact, as shown by the records of this office, that deeds Nos. 9450 and 9451 covering the allotment selection made to said Barney Thlocco, deceased, have been issued (which said deeds were transmitted to the Principal Chief of the Creek Nation for delivery, on February 11, 1903), stated that,

"The Department does not believe that the question as to whether or not deeds have been issued to the deceased or his heirs should be considered in connection with the motion for rehearing, inasmuch as deeds to land constitute only a portion of the benefits incidental to Creek Citizenship. If the name of the deceased appears on the roll erroneously, the error should be corrected."

July 24, 1905, this office received a communication from the at-

torney for the Creek Nation withdrawing all motions to reopen Creek enrollment cases filed by him prior to the meeting of the Creek Council in October, 1904.

October 2, 1905, a report was transmitted to the Department in the matter of the right to enrollment of Aaron McGirt, deceased, and it was recommended in said matter that in view of the facts in the case and of the action of the attorney for the Creek Nation in withdrawing his motion to reopen same, that the enrollment of said Aaron McGirt, deceased, be allowed to stand.

The Department under date of November 3, 1905 (I. T. D. 14250, 1905), directed that investigation be had as to the right to enrollment of said Aaron McGirt, deceased, stating that "It is not necessary for the Creek Nation to supply funds to investigate this matter.

60 You are authorized to see that correct rolls of Creek citizens are made and have been furnished with the means necessary for that purpose."

In accordance with instructions as above set forth, an attempt was made to locate the heirs of said Barney Thlocco, deceased, by letter and through a Creek enrollment field party, but the effort in this direction was unsuccessful.

Wilson Knight and Barney Yahola, upon whose affidavit said case was reopened, having died, the testimony of other witnesses was taken in this matter by the Creek field party on October 21 and November 14, 1905, neither the Creek Nation nor the heirs of said deceased being represented at said hearings.

A hearing in this matter was set for February 19, 1906. No testimony or other evidence was introduced on said date.

I am of the opinion that the testimony introduced in the later proceedings, considered in connection with the affidavit of Wilson Knight and Barney Yahola, previously submitted, conclusively establishes the date of death of Barney Thlocco as prior to April 1, 1899, and respectfully recommend that authority be granted for the striking of the name of said applicant from the approved roll of citizens by blood of the Creek Nation opposite No. 8592.

The complete record in the case is transmitted herewith.

Respectfully,

(Signed)

TAMS BIXBY, *Commissioner*.

Through the Commissioner of Indian Affairs. A. G.—200.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the lands of said tribes and that the above and foregoing is a true and correct copy of the letter press copy from the Commissioner to the Five Civilized Tribes to the Secretary of the

prior dated October 6, 1906, relative to the cancellation of the enrollment of Barney Thlocco, Creek by blood, Roll No. 8592.

THOS RYAN,

Acting Commissioner to the Five Civilized Tribes.

L.

Muskogee, Oklahoma, October 28, 1910.

T. D. 22734-1906. L. R. S.

J. F., Jr.

Department of the Interior.

WASHINGTON, December 13, 1906.

Commissioner to the Five Civilized Tribes, Muskogee, Indian Territory.

SIR: October 10, 1906, you transmitted a report in reference to the right of Barney Thlocco, deceased, whose name is contained in a partial list of citizens by blood of the Creek Nation, opposite No. 8592, to enrollment as a citizen of said nation. By reason of an investigation held by you, you consider that said Barney Thlocco died prior to April 1, 1899, and you therefore recommend that authority be granted for the striking of the same of said applicant from the approved roll of citizens by blood of the Creek Nation.

Reporting November 12, 1906 (Land 95459), the Indian Office concurs in your recommendation.

The Department has this day canceled the name of Barney Thlocco, opposite No. 8592, from the partial list of citizens by blood of the Creek Nation, and has requested the Indian Office to take similar action on the roll in its possession.

You are hereby authorized to cancel said name from the roll in your custody. It appearing that deeds Nos. 9450 and 9451, covering allotment selection made to said Barney Thlocco, deceased, have been issued and delivered heretofore, the Attorney-General has this day been requested to take such action as he may deem proper looking to the setting aside of said instruments.

Respectfully,

E. A. HITCHCOCK, *Secretary.*

Department of the Interior, Office of Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians and the disposition of the land of said tribes and that the above and foregoing is a true and correct copy of letter from the Secretary of the Interior, dated December 13, 1906, to the Commissioner to the Five Civilized Tribes authorizing cancellation of the name of Barney

Thlocco from the approved roll of Citizens by Blood of the Creek Nation, opposite No. 8592.

GABE E. PARKER,
Superintendent for the Five Civilized Tribes.

May 1, 1915. C. H. D.

End of Exhibit No. 7.

By Mr. Stuart: We object to it, your honor.

By the Court: It relates to the action of the Secretary—leads up to and relates to the action of the Secretary in December, 1906, I take it?

By Mr. German: Yes, sir. Now, your honor, we desire to make some observations in reference to this matter before your
62 honor rules on this. It arises out of this question: The Commission upon the motion of the attorney for the Creek Nation, which motion was made on August 9, 1904, re-opened this case in the year 1904, and conducted this hearing in the year 1905, all of which was prior to the year 1906, when the Act of April 26, 1906, was passed. Judge Davidson will present some observations on the effect of the re-opening of the case before the Act of April 26, 1906.

By Mr. Davidson: And there is another question if the court please, besides that. It now developes from the testimony of Mr. Angell that this patent never was delivered.

And thereupon the court hears arguments until the noon hour having been reached court adjourned until 2:00 o'clock P. M.

And thereafter at 2:00 P. M., court having convened pursuant to adjournment, further proceedings herein were had as follows:

By the Court: In view of the character of the exhibit now offered—Exhibit 7—upon which partial argument was made before the noon hour, while I practically passed upon most of those matters in an announcement this morning, I am disposed to hear you gentlemen further if you desire, in the matter. It is a thrashing over of old straw, as I conceive, but my views announced this morning in view of the character of the evidence now offered and the situation presented, are just a little bit shaken and I have concluded to take the time to hear you further if you desire in the matter.

Well, I have concluded, gentlemen, to adhere to the former rulings in this case and try the case as if the Secretary had not acted as appears from Exhibit No. 7 offered, without going over the matter again. The objection will be sustained and your exception will be noted. You may proceed, gentlemen.

Thereupon HECKTOR BEAVER was called and sworn as a witness on behalf of the complainant and testified substantially as follows, on direct examination:

I understand the English language. I go by the name of Hecktor Beaver, but am on the roll as John Beaver. I am about 60 years old

am a full blood Indian citizen of the Creek Nation. I live north of Bristow. I did live in the Hilliby Settlement southeast of the town of Stroud. I knew Barney Thlocco during his lifetime.

He lived a part of the time north of Bristow. He died east of Hilliby Creek about 10 miles southeast of Stroud, at which time he was living at the time of his death.

Q. What year did he die in?"

A. Mr. Stone: Your honor, we object. No proper predicate has been made for this question. It is first incumbent upon the Government to establish the finding in judgment of the Dawes Commission before the trial of the issues sought to be injected in this suit.

A. By the Court: In view of the ruling of the court with regard to the action of the Secretary it leaves this case now as if Thlocco were dead and enrolled. Unless it appears from the proof in this case on the part of the Government, unless the allegation is supported by some proof that the Commission acted without evidence, in my judgment that ends the case and the order of proof should be first made in relation to that.

A. By Mr. German: We save an exception to the ruling of the court.

A. By the court: Exception noted. You may first address your proof on the question as to whether or not there was before the Commission any evidence with regard to the fact that of Barney Thlocco's living until April 1, 1899, when he was enrolled.

A. By Mr. Davidson: If the court please, could not this evidence be admitted now, then if the court should hold that we had not impeached successfully the judgment of the Commission the court wouldn't consider it.

A. By the Court: What is the use of going into all this evidence if it is made to appear it is not necessary to go into it?

A. By Mr. Davidson: The court holds that it is not material evidence.

A. By the Court: I hold that the order of proof in this case should be made with relation to the allegation as to the entire absence of evidence on the part of the Dawes Commission, before the Dawes Commission as to Barney Thlocco being alive April 1, 1899. In my judgment, that judgment of the Commission should be impeached.

A. By Mr. Davidson: We can end this case in five minutes, if this evidence is not material evidence then it don't hurt anybody to let it in. That is true. Now if they will admit that all of these witnesses will testify that he did die prior to April 1, 1899, or admit that that is a fact and then set up the judgment of the Dawes Commission and rely upon that, as I understand that to be their position, we will end this case right now.

A. By the Court: Well, you have set that up yourself for the Government.

A. By Mr. Davidson: We set it up as one of the facts in this case.

A. By the Court: Well, I hold, gentlemen, that the order of proof in this case shall be first with relation to the question as to lack of evidence before the Dawes Commission.

By Mr. German: We except, your honor.

By the Court: Exception noted.

By Mr. German: We would like to make an offer as to what we expect to prove by this witness and likewise by some other witnesses of like character on the same subject.

By the Court: I don't think the offer is competent until the foundation is laid.

By Mr. German: In order to make the record according to this theory it occurs to me that it would be proper that we make the offer in the record as to what we expect to prove.

By the Court: Well, I will permit you to make the offer.

By Mr. German: We offer to prove by this witness that he knew Barney Thlocco; he knew him for a number of years before his death; that the witness lived about a mile and a quarter northwest of the home of Barney Thlocco at the time of a smallpox epidemic in the Hilliby Indian settlement in the year 1899; that the witness remembers and will testify as to when Lee Patrick, the United States Indian Agent for the Sac and Fox Agency, which agency had its headquarters about six or eight miles northwest of the location of the Hilliby settlement, established a pest camp at or near the home of this witness, and when a quarantine against the smallpox was established around the Hilliby Settlement. And that prior to this time, which was in the latter part of January, 1899, Barney Thlocco died of smallpox. By this witness we further offer to prove that he, the witness, visited the home of Barney Thlocco the night before the death of Barney Thlocco and at this time Thlocco was sick with the disease which the Indians thought was black measles. That several other Indians in the same locality were suffering from the same disease but neither the witness nor the Indians in the locality knew the affliction to be smallpox until the establishment of the pest camp by the Indian Agent in January, 1899. That the lumber used to build the coffin for Barney Thlocco was taken from an old house belonging to the witness, and witness saw Barney Thlocco's grave in the Indian cemetery about 200 yards from the house of Barney Thlocco. That the witness saw Barney Thlocco's coffin on the porch of the house of Barney Thlocco. The witness will testify that the making of the coffin, the seeing of the same at the house of Barney Thlocco and

65 observing the grave of Barney Thlocco was all before the establishment of the pest camp by Lee Patrick, the Indian Agent. Witness can and will further identify and fix the time by reason of the fact that several of the members of the witness's family died of this disease prior to the establishment of the pest camp and after the death of Barney Thlocco. That the witness will testify about the time the pest camp was established he visited the house of Barney Thlocco in company with one Jim Combest, who was then engaged as a nurse for the Indian Agent in connection with the smallpox epidemic. That Combest took from this house on this occasion all the remaining members of the Thlocco family who were yet alive and all of them were suffering from smallpox, these people being taken to the pest camp. That at the time Thlocco was dead and buried. That about this time witness took Jim Combest to

the home of Tuskegee Harjo, who was suffering from the smallpox, and Combest took Tuskegee Harjo and the members of his family to the pest camp. Witness knows that Tuskegee Harjo attended the funeral of Barney Thlocco and that Tuskegee Harjo died on the same night of his removal to the pest camp—

By the Court: Let me ask you this, Mr. German: Is it your purpose at any stage of the proceeding to introduce evidence with regard to the lack of evidence before the Dawes Commission?

By Mr. German: We have laid the theory which we have been presenting to the court. In view of the court's rulings we shall introduce, if the court denies our offer of this testimony, upon the date of the death, and when we have made our record if the court will not let us introduce this testimony unless we have proved first the charge of arbitrary enrollment, then we will introduce evidence on that subject.

By the Court: That is evidence with regard to the lack of evidence before the Dawes Commission as alleged in the bill?

By Mr. German: Yes, sir.

By Mr. Stone: We ask, your honor, that he be required to do that now.

By the Court: Here is the trouble about that: If that offer is permitted to go in the record now in advance of that other evidence, the evidence had just as well be gone into because then it will be in the record, the evidence upon one side, but as to whether or not the evidence on the other side is in will depend upon whether or not evidence is offered. After taking this long offer there is a question whether the court can consider this offer as evidence.

By Mr. Stone: Your honor, we ask that that be stricken. It presents no point not already presented to which counsel has reserved his exception and it is improperly in the record. It is not the way to try the case.

By the Court: My view of this case, gentlemen, as I have announced heretofore, and that is it presents the two questions, first, the question whether this judgment of the Commission is successfully assailed. I don't see any good purpose to be served by letting into the record this long offer to prove. I think the court should and the court will control the order of proof in this case to the extent of requiring that proof first be offered in relation to the question of the lack of evidence before the Commission and your offer to prove will be denied and your exceptions will be noted and the proof already offered will be stricken from the record and that will make your record.

Mr. German: We save our exception to striking our proof and denying the privilege of making the offer and in excluding the testimony of the witness.

By the Court: It is now the ruling of the court that the order of proof should proceed, first, upon the question of the lack of evidence.

By Mr. German: You are excused, Mr. Beaver.

(Witness dismissed.)

Whereupon EDWARD MERRICK was called and sworn as a witness on behalf of the complainant and testified as follows:

Direct examination by Mr. German:

By Mr. German: Your honor, in deference to the order of the court, but waiving no rights, we proceed now.

By the Court: The record may so show.

EDWARD MERRICK on direct examination testified substantially as follows:

My name is Edward Merrick. I am connected with the office of the Superintendent for the Five Civilized Tribes, formerly Union Agency, and prior to that, the Dawes Commission. I began work as an employee of the Dawes Commission on the 4th day of March, 1901, and was stationed at Muskogee, where the office of the Commission was. The work I did during the month of March and a part of the month of April, 1901, was to write up the records of the 1896 Citizenship Cases, following that I was placed in the Creek enrollment division. The Commission did not continue the work of enrolling Creek citizens altogether at Muskogee, but there was a party sent out to Okmulgee in March and then following that

67 May, 1901. Okmulgee was the capital of the Creek Nation. I was with the party that went there in May, 1901. We were there the first part of May. We were there, I judge, about three weeks and until the Original Creek Agreement was ratified, on May 25, 1901. We left there a day or two after that. While there myself and others were engaged in the work of listing Creek citizens on census cards for enrollment. I think Mr. Hastain and I did most of it the last few days. I entered the name of Barney Thlo on the census card, which is the Government's Exhibit No. 1. I did that on May 24, 1901, at Okmulgee. The last two or three days before May 25, 1901, we listed for enrollment between 200 and 300 names per day. That is only a guess; there was quite an office force there, Mr. Bixby, Mr. Hopkins, Mr. Lieber, Mr. Hastain, and I believe Mr. Hastain and myself wrote most of the cards the last two or three days. By listing for enrollment we mean placing the name on a census card bearing our field number, those cards were given out before they left Muskogee in the early part of May.

"Q. How did it happen that you listed so many names for enrollment during those days?

A. Well, up to the time that the party went to Okmulgee there were a great many names on the 1890 and 1895 authenticated rolls unaccounted for; that is, no one had appeared at the office to ask for their enrollment and the party went to Okmulgee at that time to try to bring in the members of the Creek Tribe who had not appeared at the office at Muskogee and not appeared before the party in March to get them to come and get them enrolled. In fact, the marshal was out there, Leo Bennett.

Q. The United States Marshal?

A. And we brought in a great many; had wagons and teams over the country.

Q. Then what did you do with the names of those who didn't come in?

A. Along about May 20th or 25th, I believe, it seemed we had brought in or citizens had appeared all that we could get and there was a provision in that treaty that provided that no name shall hereafter be added to the roll. No name shall be listed for enrollment after the ratification of the agreement.

Q. That is the first section of section 28?

A. I don't know just what section. The impression was that it was necessary that all names, all persons who appeared on the rolls (tribal rolls) unaccounted for should be listed on a card so we could say they were listed prior to the ratification of the agreement, and in order to do that the Creek Counsel held off two or three or four days acting on the agreement until we had gone through both the 1890 and the 1895 rolls.

Q. So the names that you placed on census cards, such as the exhibit as you hold in your hand, Government's Exhibit No. 1, from about May 21st to May 25th were of that class?

68 A. Well, a great many. The majority of them were. Of course, cases where no person appeared and where we had no old census cards we could only list a name as it appear- on the tribal roll because that was all the information we had.

Q. What do you mean by old census cards?

A. Well, prior to that in 1897, so I am informed, I don't know this personally, but in 1897 and 1898, parties were sent out over the Creek Nation to list members of the Creek Tribe and the names and the families were listed on what we call the old census cards."

That was really the taking of a census and not an enrollment, but we often used the old census cards to aid us in completing the regular census cards. We had an old census card of Thlocco. The persons whose names we listed for enrollment on May 24, 1901, who did not appear for enrollment we took from the tribal rolls or the old census cards. Thlocco was one of those who were unaccounted for when we went to Okmulgee in May, 1901, and I couldn't say whether the initiative or first act in writing his regular census card was done by taking his name from the old census card or the tribal roll, or whether some one appeared and asked for his enrollment, but I have no recollection of anybody having appeared and asked for his enrollment, and I have carefully searched the records in the office of the Commission and have been unable to find any record showing that anybody appeared and asked for his enrollment, and I have no recollection of any one having so appeared. We were endeavoring on that occasion to put on cards the names of all unaccounted for citizens. The plan of the Commission in preparing the final roll was to place on a so-called schedule approximately 500 names and to transmit such schedules, transmitting one at a time, to the Secretary of the Interior for approval and the so-called schedules when approved became the final roll. This schedule was made in quadruplicate, one copy for the Secretary of the Interior, one for the Commission of Indian Affairs, one for the Dawes Commission and the other for the chief of the tribe. I had to do with the prep-

aration of these schedules, and with the schedule containing name of Thlocco, I think. I would have to say that after Thlocco's name was listed on the card at Okmulgee on May 24, 1901, there was some investigation upon the question as to whether or not he was living or dead on April 1, 1899, because it was a prerequisite to their right to enrollment that they be living on that date, and the Commission would have to be satisfied, or have information of some kind, that he was living on that date. We were, however, often posed upon. The handwriting on the Thlocco card made in 1901, and was completed on that day. Some cards were not completed that day. In cases where cards were completed at a

69 time I don't think that was an end of a determination of the question as to their right to enrollment, but it was the end of the listing for enrollment, but oftentimes I remember we would obtain information afterwards, and before transmission of the final schedule, that the person so listed was not living on April 1, 1899, and in those cases where we had filled out all the information on the card the name of the person, whose name appeared thereon, to enrollment was treated as settled unless we obtained further information, which somebody voluntarily gave, but where said cards were not completed we afterwards sent out identification parties to make inquiries, and I couldn't say that after May 25, 1901, there was no investigation in Thlocco's case, but I would say that the conclusion that we come to over at Okmulgee had not been changed by one appearing or offering any evidence to the contrary.

We knew that Thlocco was dead and we apparently were satisfied at Okmulgee that he was living on April 1, 1899, but that was not a prelude further investigation. I was satisfied of that before we prepared the schedule and submitted it to Mr. Bixby, but I don't know what satisfied me. We would ask Town Kings and Town Priests when they came in, and anybody else, if they knew that, and most of the Creeks had selected their allotments at that time and we could tell whether they were living or dead on April 1, 1899, by the allotment records, for they began their allotments on April 1899. There were no approvals of enrollment until some time in 1902.

"Q. Mr. Merrick, have you talked with me about this case before you gave a statement to me in my office as to what the facts purported to be, did you not, in this case, on February 12th of this year, with Miss Freeman as stenographer?"

A. I remember of making a statement there in your office, sir.

Q. Did you not answer the question which I will read to you in the manner in which I will read it, 'Now, what would you say to whether in the Thlocco case there was any investigation made as to whether he was living or dead on April 1, 1899, at or subsequent to the date on which you made up his written census card at Okmulgee,' did you not answer that in this way: 'I would say there was none positively'?"

A. Well, that agrees with what I said a few minutes ago; I can't say but there evidently was some further investigation.

Q. I am asking if you didn't answer that question in that way?

A. Well, if you have it that way I guess I did, Mr. German. I can remember of no investigation.

Q. You have no recollection of any investigation?

A. I have none, no, sir, absolutely none.

Q. Was what you told me there the truth?

A. Yes, sir, I don't know. I can't recollect of any investigation.

70 Q. Isn't it a fact, Mr. Merrick, that you took the name of Thlocco from the old census card when you made up this card.

A. I used the old census card I am certain of that, yes, sir, because that gave me the parentage and degree of blood."

I will have to say that in view of the fact that the age on the old census card is given as 40 and that on the new as 35, and the postoffice is different, that I must have had some information other than the old census card. The old census card was secured, I think, by Mr. Hopkins when he was out in the field and they were made for persons then living. On the last three or four days before May 25, 1901, people, the Town Kings, the Town Warriors or prominent Creek citizens, would appear in behalf of others and ask to have certain persons listed, but if no one appeared then we took these tribal rolls and just took the name that appeared on the roll and the tribal enrollment and made a census card for them, but where we had an old census card we had other data, we had the parentage, the blood and the age. As a general rule the cards we made up then were completed because we had that information from the old census cards, but I would think that in all cases where the card was completed in every respect over there that some one must have appeared, because those old census cards were made prior to April 1, 1899, and we didn't know whether they were living or dead. I can't remember whether I personally learned anything about whether Thlocco was living or dead on April 1, 1899, I don't remember it if I did.

On cross-examination EDWARD MERRICK testified substantially as follows:

There were a good many Snake Indians who would not come in to allot. We were trying to complete the listing for enrollment; there was an order made by the United States Court and the marshal was there with his deputies for the purpose of getting these Indians in so we could elicit such information as we could get from them. I wouldn't say that we were there at Okmulgee for the sole purpose of determining the question as to what Indians died on or after April 1, 1899; that question was considered by us in each and every case; that was the main question at that time; that was one of them. I never listed any man for enrollment without some information or evidence. It was our practice to have information from some direction before we would complete the card

and if we found an Indian whom we couldn't get any information about with reference to April 1, 1899, we left his card uncompleted and we brought a number of cards from Okmulgee which we hadn't completed and the reason we left them over was because we couldn't get evidence that satisfied us with reference to whether they died prior to April 1, 1899. We left them uncompleted

71 where we got no information at all about them, but where we had information as to their being then living or had information as to whether they died prior to April 1, 1899, we completed the card, if we thought they were entitled to enrollment, but if we didn't have such information we left it for further investigation and a large number were left over for further identification. If no one appeared there for the further listing of a name that appeared on the roll, that is, the 1890 and 1895 authenticated Creek tribal rolls, the rolls they made payment under, we took that roll and copied the name from it, indicating the tribal enrollment, that is, the tribal town, if it was Hilliby Canadian all we could put down would be the name of the Indian and Hilliby Canadian and the number that appeared on the tribal roll, but we would have nothing as to the age, blood or parentage.

"Q. Now then when you made this investigation with reference to April 1, 1899, you got such information as you could, didn't you?"

A. Yes, sir, we tried to get all that was necessary.

Q. Sometimes the kings of a particular town would come in, wouldn't they?

A. Yes, sir.

Q. And gave you this information?

A. Sometimes individual Indians would come in and give you the information.

Q. Is that so?

A. Yes, sir.

Q. Sometimes you would get it from one source and sometimes from another source, isn't that true (true)?

A. Yes, sir.

Q. But your invariable custom and practice was to never fill out one of the cards until you had some information from some source with reference to the question as to whether he was living or whether he died prior to April 1, 1899, isn't that true?

A. I would say that it is.

Q. Then, as a matter of fact, Mr. Merrick, you never as clerk of that Commission ever arbitrarily listed any man, did you?

A. No, sir, I don't think I ever arbitrarily enrolled a person.

Q. You never enrolled any man, Mr. Merrick, without some evidence, did you?

A. I don't think so, no, sir, not knowingly."

When these men were listed for enrollment, as I have said, we would collect a batch of them and before they were sent to Washington the clerks and Mr. Bixby, the Chairman of the Commission, would get together and go over every one of them. I would take the cards and whatever we had to Mr. Bixby and he usually went

them with me and he compared the cards and all the data before they were sent to Washington.

Now you never listed any man solely because he was on the of 1895, did you?

A. No, sir.

Q. You just took that to find his quantum of blood, didn't you?

A. Listen, judge, as I said the last three or four days we had all names but we never completed the schedule.

Q. Or purely from the roll as it stands?

A. Yes, sir.

Q. You required some separate individual evidence outside of that roll before you would complete (complete) that schedule?

A. Yes, sir, that roll is dated 1895.

Q. Now I would like to have that old census card. Now I want to look at this Barney Thlocco there and then this there the card and show the court, please, the matters of difference between those two cards. What is this?

A. May 24, 1901. This is the photographic copy of that."

By Mr. Stuart: Let these be marked defendant's Exhibits Nos. 1 and 2 on cross-examination.

Defendant's Exhibit No. 1 is identical in words and figures as Government's Exhibit No. 1, set forth in full hereinbefore.

Defendant's Exhibit No. 2 is in words and figures as follows, wit:

[See insert herewith for photographic reproduction of Defendants' Exhibit No. 2, marked page 72½.]

Family No 438

Wewok

[illegible]

Wewoka

District.

CARD
~~Page~~ No. 2866

[illegible]

Department of the Interior, Office of Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the *Cherokee*, Chickasaw, Cherokee, Creek and Seminole tribes of Indians and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of old Creek Indian census card No. 2866.

(Signed)

GABE E. PARKER,
Superintendent for the Five Civilized Tribes.

May 3, 1915. C. H. D.

By the Court: Will take a recess until tomorrow morning at ten o'clock.

Whereupon an adjournment was taken until tomorrow morning at ten o'clock.

And thereupon court re-convened May 7, 1915, at 10:00 o'clock pursuant to adjournment, and the following proceedings were had:

73 And thereupon EDWARD MERRICK was recalled for further cross-examination.

By Mr. Stuart: Your Honor, we have no further questions.

On redirect examination EDWARD MERRICK testified substantially as follows:

I mean by unaccounted for citizens, names on the 1890 and 1895 authenticated tribal rolls who had not up to that time been listed for enrollment or placed on a card or disposed of in some manner. The Creek Nation Council was in session at Okmulgee when we reached the point of having several hundred names that were unaccounted for and not listed on any card and I understood that the Commission had asked the council to withhold taking action on the Original Creek Treaty until we could list all these unaccounted for names, and we listed them and we did that as rapidly as we could until we completed it, working early and late, one or two nights until twelve o'clock.

"Q. Now let me ask you this: Did you enroll during that two or three days there when you were listing these names that were unaccounted for, did you list those names for enrollment when you were satisfied they were living on April 1, 1899, or did you list them when you were not satisfied that they were dead on April 1, 1899?"

A. We listed every name unaccounted for that was on the 1890 and 1895 rolls. A great many of them we didn't know whether they were living or dead and we didn't know when they died if dead.

Q. Now it was under that circumstance that you listed the name of Barney Thlocco?



Microcard Editions

An Indian Head Company

A Division of Information Handling Services

CARD 2

A. He was one of the unaccounted for."

The descriptive features which we placed on the census cards were the age, the blood, tribal enrollment and parentage.

"Q. Now when you completely filled out a card it meant that you had determined that the person was entitled to enrollment, did it not?

A. Not necessarily determined that he was entitled to enrollment but determined the fact that we thought he was entitled to be enlisted for enrollment. We listed these people for enrollment and then later we made up the schedules and they became enrolled citizens when we forwarded the schedules to the Department and they were approved.

Q. You made up your schedules from the completed census cards, didn't you?

A. Yes, sir."

By the Witness: I want to correct a statement I made yesterday, "I understood Mr. German referred to a statement that I said positively no testimony had been taken in that case and I understood him to say possibly, and possibly is what I should have said if I didn't say it. I said possibly no evidence was taken in this case."

On recross-examination said witness testified substantially as follows:

I repeat and say that the Commission must have been satisfied that Thlocco was living on April 1, 1899, or the name would not have been submitted.

"Q. Do you know, without referring to any particular fact, that you never included any man's name in the schedule without taking evidence, did you?

By Mr. German: We object to that as speculative.

By the Court: It is proper cross-examination, I think.

By Mr. German: We except.

Q. Isn't that a fact?

A. That is a fact that we had information that we thought we could rely upon that that person was living on April 1, 1899.

Q. And you always got that information before you submitted it?

A. I think we did or tried to. We were often imposed upon.

Q. That isn't the point, did you take the evidence in every case before it was scheduled?

A. We got information somewhere, yes, sir.

Q. Before this schedule? Yes, sir. That is all. Well, there is just one question, your honor. I started to do that yesterday by exhibit. There is a difference between the last card of Barney Thlocco and the old census card, isn't there?

A. There is in two particulars I think.

Q. In two particulars. Now you couldn't have gotten those additional facts without additional information could you?

A. Undoubtedly somebody gave us that information.

Q. And that now convinces you does it, Mr. Merrick, that you did make an investigation of Barney Thlocco's case in Okmulgee?

A. Well it seems that someone connected with the Commission did.

Q. Somewhere there was an investigation?

A. Yes, sir.

Redirect examination by Mr. German:

Q. That additional information; what was it?

A. There is a difference in the age.

Q. What is that difference?

A. I think on the old census card the age is given as forty and on the field card it has the age given as thirty-five.

Q. Field card, what do you mean by that?

A. Well that is the regular census card, the age is given as thirty-five.

Q. That would be some information then on the question of the age, wouldn't it?

A. Yes, sir, all the other information could have been had from the old card.

75 Q. What other information did you mention?

A. I think the postoffice on the old card was Sac and Fox Agency and the new one Arbeka.

Q. Now that would be information as to his postoffice?

A. Yes, sir.

Q. What information did you receive as to whether Thlocco was living or dead on April 1, 1899?

A. Well, sir, I couldn't answer that except in one way. I can tell you all I know about it. That when we wrote these cards over and listed these people for enrollment we have before us the authenticated tribal roll of the Creek Nation and when we listed these persons we noted that on the card, our field number, and that is in my handwriting and opposite the name of Barney Thlocco appears in lead pencil 'Died in 1900' and I know that was there before I wrote the card because it was written in the place where I would have placed the number had that writing not been there, and I placed the number right above it. And possibly with that notation it may be no evidence was given at Okmulgee on that day so far as listing this fellow because we know he was alive in 1897 or 1898 because Mr. Hopkins listed him for enrollment he was living. Then later there was a notation made on the 1895 roll 'Died in 1900.' That is the reason I stated, Mr. German, that possibly there need be no evidence given there as to those facts, and I would say that that is possibly true.

Q. You are basing your statement, are you not, that they must have had some evidence as to whether he was living or dead or (on) April 1, 1899, merely because of your theory that the Commission would not have enrolled him if they had not had that information?

A. Well, yes, sir, to a great extent that was our theory, that was our plan, of course, to satisfy ourselves that they were living on April 1, 1899."

On examination by the court said witness testified substantially as follows:

This notation, "Died in 1900," appeared on the 1895 pay roll of Tuckabachie Town opposite the name of Barney Thlocco. It is just a lead pencil notation and I think it is in Mr. Hopkins' handwriting; it appeared there at the time I was listing that name for enrollment and the reason I know that is that where this notation appears is the place where I would have placed the field number of our census card, and the notation being there, in order not to obliterate it, I put the field number above it out of the usual place, so that I know the notation was there when we were listing these people in May, 1901.

Witness excused.

76 And thereupon PHILLIP B. HOPKINS was called and sworn as a witness on behalf of the Government, and on direct examination testified substantially as follows:

My name is Phillip B. Hopkins, and I reside at Muskogee, Oklahoma. I was connected officially with the Dawes Commission from the fall of 1897 until some time in the spring of 1903, with the exception of six months in the middle of the year 1900. The title of my position was Chief Clerk, Chief Attorney. I was principally in charge of the Creek enrollment work, there was a census of the Creek Indians taken by the Commission beginning in the fall of 1897, there being a party sent out for that purpose. Defendants' Exhibit No. 2 appears to be in my handwriting. It is a photographic copy. I don't think there can be any question but what the card was made out some time between the middle of October, 1897, and December 20th or 25th, 1897.

By Mr. German: Your honor, we offer this in evidence as Government's Exhibit No. 2.

By Mr. Shea: There is no objection.

By the Court: It may be admitted.

Government's Exhibit No. 8 is in words and figures as follows:

This exhibit is the same instrument as defendants' Exhibit No. 2, hereinbefore set out in full.

I remember the occasion of the National Council of the Creek Nation ratifying the Original Creek Agreement, which is the Act of Congress approved March 1, 1901, and ratified by the National Creek Council May 25, 1901. I was in the party that was sent by the Commission to Okmulgee just prior to the ratification of that treaty. My recollection is that we arrived in advance of the meeting of the council. This was approximately a couple of weeks before May 25, 1901. The headquarters of the Commission were in Muskogee; Okmulgee was the capital of the Creek Nation. The purpose of our party there was to look after the ratification of the treaty and for the purpose of enrollment. Mr. Bixby, Chairman of the Commission, Mr. Merrick, Mr. Hastain and others of the Commission were there. My recollection is we had practically the entire force who were interested in Creek enrollment work and Creek allotment work

over there. There had already been a large number of citizens enrolled and we proceeded with the work of listing for enrollment citizens, or names upon the tribal rolls, who had not been disposed of, so far as being listed for enrollment was concerned. There were a number at that time who had not made any appearance and for whom no application for enrollment had been made. In considering the proposed Creek Agreement the question was raised by officers of the tribe that the first sentence of section 28 might be construed to mean that the roll we were making could not be added to after the date of the ratification of the treaty, that sentence reads "No person except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement." As a result of the possibility of their construction being correct, we entered tentatively on the census card, or census cards, the names that appeared upon the tribal rolls that had not been listed for enrollment; they were so listed on the regular census cards. When we finished listing for enrollment those we did have information about, we had some that we did not have information about and we listed them because of the possibility of the construction of the treaty that some of the council members contended for. The practice of the Commission and the rule had been that all adults should appear in person and apply for enrollment. We accepted applications by one person for another only in the case of minor children, from parents and guardians and we had continued the practice up to that time. For practically 60 days we had had different parties out using every means at our disposal to get these people to come in for enrollment and just prior to the ratification of this agreement, if I remember, there were still a number who had not appeared whose names did not indicate that they appeared and their names were entered on one of these new census cards, the regular census cards. Officers of the Creek Nation said "what is to become of those who haven't yet appeared?" and that if the agreement is ratified some people contend that they never would have a chance to get on the roll and that they would like to have their names entered up. Just what information we got as to those people I can't tell now, but there were representatives of the Creek Nation present and the Creek attorney; the Town Kings were all there at that meeting and we endeavored to get all the information we could; if there were any names concerning whom we couldn't get information at that time I can't recall it; still it might be possible. If there had been a few names or a number of names on the tribal roll concerning whom we couldn't get information from those who were present at that time, officers of the tribe, members of the council or the Creek attorney, it may be possible to relieve their doubt as to whether they might be listed afterwards, that we entered even those on the cards for further investigation. I presume that there were a number of names entered on the cards just before the ratification of the treaty under the circumstances I have just related. The United States Marshal and his force, and our field forces were constantly bringing in people there who they found had not been

entered and were having them enrolled. So one card may have the name of the applicant who really appeared and the next the name of one who did not appear, but about whom we got information from someone else, or possibly enter his name tentatively on the card to relieve the doubt of some town king or officer. The 1895 authenticated pay roll of the Creek Nation consists of the separate pay rolls of the 47 different Creek towns, these 47 different town rolls taken together constitute the so-called 1895 pay roll; that roll, together with a similar roll made in 1890, were used by the Commission in its work of enrolling the Creek citizens. We got these rolls into our possession some time subsequent to the passage of the Curtis bill, the Act of June 28, 1898. The notation on the 1895 Tuckabachie Town roll opposite the name Barney Thlocco, "Died in 1900," is in my handwriting. Such notations as that came to be made on the tribal rolls because prior to the Original Creek Agreement ratified May 25, 1901, and while we were working under the Curtis bill, we were not authorized to enroll deceased Indians and were only enrolling living Indians, and when applicants came before us for enrollment who appeared to know anything about the members of the tribe or their families, or related families, we sought to get all the information we could as to their qualifications for enrollment, whether they were living or dead or were citizens by adoption, etc., and it was the practice at the time to note that on the tribal rolls that we were examining at the time so that it might put somebody on inquiry to get a record made in that case. We had gone into the field in 1897 and at other times and had taken a census, keeping our information on what is called the old census card, of which Government's Exhibit No. 8 is an example. With reference to the notation "Died in 1900," placed opposite Barney Thlocco's name on the 1895 tribal roll, I would say that evidently somebody gave me the information upon inquiry about Barney Thlocco, and possibly in the examination of this roll with reference to other names, that he had died in 1900. I don't know who may have given me that information. I don't know what use was made of the notation, but I know it was intended that when the Commission came to pass on that name for final record on the roll that an inquiry should be made as to when Thlocco died or whether he was dead and get the proper death affidavit and death proof. It was the practice to note it on the census card where the Commission had knowledge or proof of the death of the party. That note

79 on the census card generally consisted of a notation that proof of death was filed at such and such a time; it might not state the date of death, but the date when the proof was filed and referred to the record from which the date of death could be obtained.

The old census card was intended to be a record of the applicant for enrollment; the new census cards were not made up from the old cards, but the latter were referred to at times where there was doubt as to the number of children in the family or we wanted to get some additional information, for the rule after April 1, 1899, was that all people should appear in person, and make application for their enrollment and allotment, except in the case of minors, and we did not copy the new cards from the old cards unless there was no appli-

ation or appearance made for them. I think it must have been after the work was along toward completion that we had some of the clerks check the old cards with the new ones mainly to avoid duplication of names, for when we were in the field and had no tribal rolls whatever to guide us the Indian name was frequently given by a full-blood or by somebody representing another, when, as a matter of fact, the town kings had been carrying them on the tribal rolls under their English or school names. In each case, however, a new census card was supposed to be made and the old census card was not the thing from which the final roll was made.

There was a form of certificate of allotment prepared for use in the Creek Nation in cases of allotment made to the heirs of deceased citizens; there were three forms of patents prepared, one for the allotment of the homestead, another for the allotment of the surplus and one for allotments to the heirs of deceased citizens. It was the practice of the Commission in cases where the enrolled citizen was dead to allot the lands to his heirs.

By Mr. German: We offer in evidence Government's Exhibit No. 9.

By the Court: It may be admitted.

80 Government's Exhibit No. 9 is in words and figures as follows, to-wit:

[See insert herewith for photographic reproduction of Government's Exhibit No. 9, marked page 80½.]

Gov Ex. #9. Ex. 2017-11/151

PAY ROLL

Tuckabache Town.

NUMBER		NAME.	Per Capita.	Amount Paid.	SIGNATURES AND MARKS.
Last	Present				
410	1	George Smith	262.1	45.20	George Smith
411	2	Ross Smith	262.2		
412	3	Mary Ann Smith	261.4		
413	4	Alfred Smith	262.3		
414	5	Emiline Smith	252.1		
415	6	Geneva Smith	261.4		
416	7	Lilly Smith	261.4		
417	8	Adelle Smith	252.4	45.00	
420	1	Mary Tiger	243.5	44.40	Mary Tiger
421	1	Thos Carr	455	28.80	Moly Tiger
422	2	Reuben Weaver	455	28.80	
423	1	William Gimby	524	150.4	Lita Misco
424	1	Ducky Webster	1573	278.8	Ducky Webster by husband
425	2	Edwards Webster	1573	278.8	
426	3	Patience Webster	1573	278.8	
427	4	Chapman Webster	1573	278.8	
428	1	Martha J. Morton	501	79.7	Martha J. Morton
429	2	Richard J. Morton	501	79.7	
430	2	John N. Morton	501	79.7	
431	4	Reuben M. Morton	501	79.7	
432	1	Sallie Jones	Dead	Dead	Washington Jones by husband
433	2	Gemma Jones	1474	137.8	
434	3	John Jones	2865		
435	4	Michael Jones	2865	5.00	
436	1	Lucy Scott	1450	97.5	Lumber Scott
437	2	Martha Scott	1450	97.5	
438	3	Jemima Scott	1450	97.5	
439	4	Wilhi Brown	1450	97.5	
440	5	Ardis Brown	1450	97.5	
441	6	Melinda Brown	1450	97.5	
442		Barney Thoburn	2666	26.00	G. Arlding
443		Tuckabache Targo (Dead)	2666	26.00	

ROLL.

MARKS.	SIGNATURE OF WITNESS.	DATE OF RECEIPT.
to his X mark	Cornelius Barr	Oct 2nd ✓
		74/ 245. } 200 1/2 Walden
	Cornelius Barr	Oct. 3rd ✓
his X mark	Cornelius Barr	Oct. 3rd ✓
his X mark	Cornelius Barr	Oct. 8th ✓
his X mark	Cornelius Barr	Oct 2nd ✓
his X mark	Cornelius Barr	Oct 2nd ✓
his X mark	Cornelius Barr	Oct. 3rd. ✓
his X mark	Cornelius Barr	Oct. 2nd ✓
his X mark	Cornelius Barr	Oct. 11th



Department of the Interior, Office of Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma.

This is to certify that I am the office- having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes of Indians and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of 1895 pay roll of Tuckabatchee Town in the Creek Nation of the Indian Territory as on file in this office, in so far as the same pertains to members 412 to 444 inclusive.

(Signed)

GABE E. PARKER.

Superintendent for the Five Civilized Tribes.

May 3, 1915. C. H. D.

On cross-examination PHILLIP B. HOPKINS testified substantially as follows:

The names that were tentatively listed at Okmulgee for further investigation were in some manner kept track of. I don't recall as to their being kept separate or whether just provision was made with reference to them, but the Commission following that meeting at Okmulgee commenced in August thereafter and continually carried on an investigation for evidence as regards each name. I am satisfied that this is true, but I will say that the records of the Commission will show that fully.

"Q. Yes, sir. Under the practice of the Commission, Mr. Hopkins, can you not say that it is true that by sending out field parties to make inquiry and by the bringing in of witnesses you did finally, before the names were certified to the Secretary of the Interior for approval, take evidence in each case?

A. Yes, sir.

Q. Is that not true?

A. Yes, sir.

Q. Do you recall that in the month of August, following this Okmulgee meeting that the Commission sent out field parties, particularly in the western part of the Creek Nation, where Barney Thlocco had lived, to inquire and report back to the Commission whatever evidence they could find there with respect to whether the persons so tentatively enrolled were living on April 1, 1899;

81 A. I remember the field parties were sent out; I couldn't recall the exact month.

Q. Now that was after the Okmulgee meeting?

A. Yes, sir, there were parties out after that time and ultimately before any of these tentative enrollments were sent to the Secretary the Commission became satisfied on evidence that the names of the parties whose names were transmitted to the Secretary of the Interior for approval were entitled to enrollment."

By Mr. German: I object to that question as calling for a conclusion and opinion of the witness rather than of fact.

By the Court: It is proper cross-examination, I think.

By Mr. German: We except.

By Mr. Stone: Read the question.

(Question read.)

"A. Yes, sir.

Q. Mr. Hopkins, referring to the notation which you put on the 1895 roll, I understand you to mean that the effect of this notation there means that you had personally some evidence before you as to whether or not Barney Thlocco was living on April 1, 1899, else you would not have made the notation?

A. Evidence for information, yes, sir.

Q. And information which you got in the due course of affairs?

A. Yes, sir.

Q. Mr. Hopkins, what would you say as to whether or not the Commission arbitrarily enrolled any Creek citizens?"

By Mr. Davidson: We object to that as a conclusion.

By the Court: He may answer.

By Mr. Davidson: Exception.

"A. No, sir, it did not.

Q. Did they enroll any citizen without evidence?

A. No, sir, I don't believe, in fact I don't see how it would be possible to do it.

Q. In every single case if the applicant did not appear before you some one whom you regarded as reliable appeared for him and gave the evidence until the Commission was satisfied?

A. Yes, sir."

On re-direct examination PHILLIP B. HOPKINS testified:

"Q. Mr. Hopkins, you say the Commission didn't enroll anybody without evidence. Take the Thlocco case. The Commission had evidence that he was a citizen from the tribal rolls, didn't it, and from the old census card which you had made?

A. Yes, sir.

82 Q. That was evidence?

A. Yes, sir.

Q. When you say that no citizen was enrolled without evidence you mean that they didn't enroll anybody unless they had evidence of some kind that he was a citizen of the tribe?

A. Yes, sir.

Q. That is what you mean?

A. Yes, sir.

Q. Now you stated a while ago that when you acquired the information upon which you made that note on the tribal rolls that when you had information or evidence, as you put it, evidence or information as to whether he was living on April 1, 1899, when you acquired that information and made that note rather the time when you acquired that information must have been some time during the year 1900, must it not? I invite your attention to the fact that Mr. Merrick's notation here of the numbers 3456 does not appear directly

the name of Barney Thlocco as numbers do opposite the names of some others on this roll, but was evidently placed above the notation you had made, 'Died in 1900,' and evidently because the words 'Died in 1900' were in the way?

It appears to be that way.

And those figures 3456 were evidently placed there when he placed the census card on May 24, 1901, were they not, as that identifies the name as being the same name that he placed on the census card May 24, 1901. Would that not be true?

Yes, sir, I think so.

Then you must have obtained that information prior to the time that the census card was made on May 24, 1901?

I have no doubt but what all that information was given before that time, otherwise I would have noted it in the card and not in the tribal roll, or on both.

Yes, because it was the practice to note on the census card such information or the determination or conclusion that was reached when you enrolled a dead citizen, that is true?

Yes, sir, that is, when the record was complete, when we had sufficient testimony upon which to base an opinion, but a notation as this made here in pencil would have been made here in ink on the census card simply to put somebody on their guard or to say as to that case and not as a completed record in ink, as it was given by somebody who was not in position to make an affidavit to that.

Then that note was made so that the clerks or anybody connected with the Commission when they came to consider the case of Barney would make an investigation as to whether he was living or dead?

Yes, sir.

That was the purpose of it?

Yes, sir."

Mr. German: That is all, your honor.

Examination by the Court:

'Q. What do you mean, Mr. Hopkins, a short time ago in one of your answers when you said the records of the office would show whether evidence was taken in regard to this five allotment?

Mr. German: Tentative enrollments, your honor.

the Court: Tentative enrollment after May, 1901.

Whenever any question was raised by the Creek Nation or its agents with reference to the right to enrollment or for any reason whether they were living or dead or not, there was generally testimony taken in those cases. Just as in court here where an attorney is expecting to go up on appeal he has the evidence taken. There were a number of cases in which testimony was taken, sometimes with reference to a specific case; other cases where the witness was examined with reference to a great many others.

With reference to those people whose names up to March, 1901, had not been accounted for there were lists of those made and sent to the various town kings and sent to the king of the tribe and various inquiries made that way and report came back. Sometimes the party addressed came in and gave verbal testimony and if it seemed clear to the Commission it was probably not reduced to writing. If there was any question with reference to the matter it probably was reduced to writing; and I couldn't say whether this was one of those cases where testimony was taken or whether it is covered by one of those reports made by the various town kings or the chief of the tribe or not. I have referred to the fact that the records of the Commission contain a great deal of information with reference to cases that we had under consideration."

On further cross-examination the witness testified substantially as follows:

"Q. The written evidence to which you refer was taken just in that class of cases, was it not, where the right of the person was challenged some way, is that not true?

A. Or where a question had been seriously raised as to whether or not they were living on April 1, 1899.

Q. Many cases were investigated without any written record or evidence were there not?

A. Yes, sir, a great many cases were investigated."

I can't recall that it was later than the Okmulgee meeting that the Commission commenced to note on the census cards the date of death of the person. With reference to the patents the practice was to issue the patent in the name of the party according to the roll where no proof of death was filed with the Commission, or where the heirs had not appeared and filed proof of death and claimed the right to have the deed issued to them. The census cards

84 after they were first fully made out were always subject to additional record, to the notation of additional information, but the card may have been completed the first time it was made out. The applicant may have furnished the complete information. The Creek Commission and the Creek attorney may have vouched for the party; it may have been completed at that time and no other record made on it, except that it had been passed to the final roll, for until the roll was approved it was subject to the entry of any matter that affected the right to enrollment.

"Q. Is it not a fact that the record was never completed, that is all the entired(s) made until the Commission was satisfied of the right of a person to enrollment, subject, of course, to the further inquiry if a question arose?

A. I don't quite get your idea, Mr. Stone.

Q. Let me illustrate.

A. The Commission had to be satisfied from the records."

Referring to that class of persons who were tentatively listed at Okmulgee the cards were completed whether we were satisfied with the evidence or not at the time we got information necessary to complete the cards, but no doubt some of those cards made there

were made without accurate information as to the name of the father or mother, or matters that went to the identification, but the Commission never passed on a card until it was completed. We entered on the cards such information as we believed to be true at the time we gathered it, and if we gained other information with reference to other things necessary to enable the Commission to pass on the right to enrollment that was added on the card. It may have been picked up by piece meal over a year or two before the Commission was satisfied that the party was entitled to enrollment, but the records were made up for the purpose of the information of the Commission. The record was kept to show such information as was necessary to enable the Commission to reach a decision.

Witness excused.

Thereupon E. HASTAIN being called on behalf of the Government and sworn under oath testified on direct examination substantially as follows:

My name is E. Hastain. I reside at Muskogee and was an employee of the Dawes Commission from April, 1899, until, I think, 1902. I worked principally in the Creek enrollment division. I was at Okmulgee in May, 1901, when the Commission was there, while the Creek Council was in session, and I was aiding in the work of enrolling Creek citizens. All the names that appeared on the 1890 and 1895 tribal rolls that had not been listed for enrollment were listed for enrollment there prior to May 25, 1901, is my recollection. The occasion for listing them was in order to satisfy the Creek Council who were to vote upon the ratification of the Creek Agreement because some of them feared that if they ratified this agreement there might be some citizens who were not enrolled and under section 28 of that treaty the Commission would not have authority to later enroll them. I assisted in making up the census cards on that occasion and there were approximately two thousand filled out during that month.

Before May 25, 1901, there were a large number on the tribal rolls who had not been listed for enrollment and we placed those names on census cards without a determination of the question as to whether they were living or dead on April 1, 1899; we had no information as to that. When we enroiled a deceased person we made a memorandum on the bottom of the census card that he was dead, giving the date, or, if we had a death affidavit, we would say "see death affidavit attached hereto or in jacket so and so." If we didn't have a death affidavit we simply made the memorandum in ink.

On cross examination said witness testified substantially as follows:

In the course of our work at Okmulgee when we had information that the name was entitled to go on the final rolls we completed the card, and if we didn't have the information or evidence, we didn't complete it. Where the cards were incomplete, if we had no further information than the tribal roll, we put the name, the page of the tribal roll on which it was found, and the name of the tribal town,

that was about all we could put on. In Barney Thlocco's case, if we had nothing except the tribal roll we would have to put on the census card "Barney Thlocco, 1890, Tuchagachie, page 238; No. 1 on 1890 roll as Barney Thlocco; No. 1 1895 pay roll No. 443," and down at the bottom right hand corner "May 24, 1901." If that card was completed at Okmulgee it indicates that the party who wrote the card was satisfied on that day that Thlocco was living on April 1, 1899, satisfied on some form of evidence "must have been, yes, sir." To complete the card we would have put on it the post-office address, age, sex, degree of blood, name of father, whether living or dead, name of mother, whether living or dead, and the towns to which they belonged, then any other information that we might have. There were two classes of cases at the Okmulgee meeting, one where we were satisfied on evidence and the cards were left incomplete, and where we were not satisfied we

subsequently conducted an investigation to determine from evidence the right to enrollment. I was clerk in charge of the

Creek enrollment division prior to the time we were at Okmulgee and subsequent thereto up until the time of my resignation and during that time I investigated as far as I could these incomplete cards and completed the enrollment; however, during the time that we were at Okmulgee we had a large force on that work and I did only a portion of that enrollment.

I superintended subsequent investigation but did it in the office. I didn't go out into the field, there were field parties who went out and I had nothing to do with them. Where there was anything attracted my attention to any claim which appeared to be doubtful I always proceeded to make an investigation and to take some sort of proof there in writing or verbally upon the point. So far as I was concerned and so far as my knowledge went there was in all cases some evidence upon the point as to whether the applicant or the citizen was living or dead on April 1, 1899, before the rolls were recommended to the Secretary for approval, that was my understanding of the practice of the department. In the month of May, 1901, the Commission sent out parties to the community where the Indians lived and brought them in in a great many instances where they had no means to travel and the United States Marshal assisted in that work to some extent. This enrollment at Okmulgee was done in the upstairs of the council house in a room across from the room known as the house of kings. Town kings and warriors were in attendance at the council.

"Q. And as you and Mr. Merrick sat there and enrolled citizens, is it not true that occasionally Mr. Bixby himself would come to you and give information that a particular citizen was entitled to enrollment or send to you a note to that effect?

A. I think that is true.

Q. Then upon his verbal statement or some written request he would send you, you would enroll a person?

A. That is true.

Q. Now as you were there in that line of work there was appearing before you almost constantly, were there not, or before Mr. Bixby,

ominent men of the Creek Nation, heads of the different towns, own Kings, who were giving information as to the rights of citizens to be enrolled and as to whether or not persons were living April 1st, 1899?

A. Yes, sir, that is true.

Q. You were continually surrounded by persons informing you at that point, weren't you?

A. We were getting all the information we could from every source possible at that time.

Q. Well, they came before you almost constantly didn't they?

A. Yes, sir.

Q. And there was no written record made of that?

A. No, sir.

Q. Except a conclusion that you may have drawn from that?

A. We didn't make any written record except in contested cases.

Q. Where a charge had been made against an applicant?

A. Yes, sir.

Q. Now, how long after this Okmulgee meeting did you continue under the Commission to carry on this work of investigation to satisfy yourself in reference to those who had not had their enrollment completed at Okmulgee?

A. Some time during the year 1902 up until some time during that year.

Q. The Commission was engaged almost constantly in the Okmulgee meeting until some time in 1902, in the further investigation, where you had not become entirely satisfied at the Okmulgee meeting?

A. Yes, sir.

Q. Do you remember the names of any of the head men or Town Kings of the Tuckabache Town?

A. I can't recall who was the Town King now of Tuckabache Town.

Q. Do you know G. A. Alexander, formerly a member of the Townsite Commission?

A. I did know him, yes, sir.

Q. Do you recall whether or not he was personally there before Mr. Bixby on that occasion?

A. I can't say now. I don't remember.

Q. Can you say approximately how many witnesses appeared before the Commission at the Okmulgee hearing?

A. No, sir.

Q. There were hundreds weren't they, hundreds upon hundreds?

A. There were a great number.

Q. They gave these statements sometimes to you and sometimes to Mr. Merrick and sometimes to Mr. Bixby?

A. Well, there was Mr. Lieber, Mr. Beavers, I believe was also assisting; there was several engaged in enrolling there.

Q. And one of the particular points that you were constantly investigating was whether or not these persons were living on April 1st, 1899?

A. We always got that information wherever we could.

Q. And where you didn't get it in a satisfactory form you didn't complete the cards?

A. No, sir, we just—As I stated."

On redirect examination said witness testified substantially as follows:

I think we must have had in mind prior to May 25th the question as to whether citizens were living or dead on April 1, 1899, because the agreement had been enacted by Congress and was pending for ratification by the Creek Council and we knew what

was in that agreement and we were framing our work so that if it was ratified we would not have it to do over again.

I am sure we did that, and it is my recollection that where we found that a person was dead at that time and that he was living on April 1, 1899, that fact was noted on the census card.

"Q. Now if you didn't have information on that subject and you completed a card there, you treated that person as living at the time you made the card?

A. Yes, sir.

Q. And enrolled him as a living citizen?

A. Yes, sir."

And thereupon court takes a recess for the noon hour.

And thereafter court having convened pursuant to adjournment further proceedings herein were had as follows:

And thereupon E. HASTAIN being recalled for further examination on further redirect examination testified substantially as follows:

When I stated on cross examination that the fact that this census card of Thlocco's may have been completely filled out on May 24, 1901, meant that Thlocco was living on that date, I referred to the date May 24, 1901, and when I stated on cross examination that the Commission did not make any written records except in contest cases I meant by that written records independent of the census card and the record made thereon. I meant a record by which the witness was sworn and his testimony taken down in shorthand and transcribed.

On recross examination said witness testified substantially as follows:

There had been an old census card in this case and there was another census card and it was fully made out.

"Q. You have seen it here, haven't you?

A. Yes, sir.

Q. And as a clerk of the Dawes Commission, remembering your duties there and the manner in which you conducted your work, when that card was presented to you, you assumed from the practice

ch then prevailed, don't you, that proof had been made of
 ything necessary to put that man on the roll?
 . I do."

Witness excused.

And thereupon EDWARD MERRICK being recalled for
 further cross examination testified substantially as follows:
 y explanation of my failure to note on the final census card
 Barney Thlocco the fact of his death would be that at that
 we had no proof of death and regular affidavit made on the
 a that we had. I don't think that during the process of en-
 nment we made a notation on a card showing the death with ink.
 times we would make a note with a soft lead pencil on there;
 verbal information, but when we noted on the card the date
 n he died, I think in all cases we had a proof of death in
 avit form. I don't think we would put the notation on there
 ink until we had some proof, until we got the affidavit, I think
 was the practice.

is possible that for want of the affidavit stating the exact time
 is death we didn't make any notation on that card, and I think
 that is in accord with the practice.

n redirect examination said witness testified:

Q. In other words you wanted proof of death?

. Yes, sir, we wanted proof of death when we made the nota-
 on there.

. So that the question could be determined?

. Yes, sir."

Recross-examination by Mr. Stone:

Q. You mean proof of the death or proof of the date of the
 h that you wanted from the affidavit?

. Affidavit of the death, date of the death, the month, year and

. Usually when we got that we would make a notation on the
 d in ink; a permanent record."

Witness excused.

nd thereupon JOHN G. LIEBER being called on behalf of the
 ernment and sworn under oath testified on direct examination
 antially as follows:

My name is John G. Lieber. I live north of Muskogee. I am
 ember of the bar of Muskogee. From May 31, 1899, until some-
 e in 1904 I was connected with the Dawes Commission, a part
 he time as a clerk in the Creek land office and the remainder of
 time in charge of the allotment contest division. At times I
 connected with the Creek enrollment work and familiar with
 work up until sometime in 1901. I was a member of the
 field party at Okmulgee in May, 1901. I don't remember
 all the members of the party, but Mr. Bixby, Mr. Hopkins,
 Mr. Hastain, Mr. Merrick and Mr. Beaver were there. I

don't know whether Mr. Beaver is living or not, he lived here several years ago. His home is in Arkansas. The party that went to Okmulgee was sent there because the Indians would be there for the Creek Council was called in session for the purpose of passing on a treaty which had been enacted by Congress, that is, the warriors and kings, as they called them, would be there, and an effort was to be made to get as many people enrolled as possible, in fact all if we could, by that time. A great many had been enrolled, but there was still a number who had not been and that was the object of our party over there. My particular work was in connection with the allotment contest work, but there was not very much of that kind of work at that time and I was frequently used in connection with the work of enrollment. I helped the boys who were at that work in putting the people on cards. I wrote a few cards. We got the data when we first went over there and until about the 22nd or 23rd of May, 1901, from the town kings and warriors and citizens themselves that would come to be enrolled. Another source of information was from the tribal rolls and the old census cards. The data that was put on the new census cards consisted of the name of the citizen as it appeared on the tribal roll, or if it appeared differently on the old census card it was put on that way, and the town that he belonged to, and the tribal roll that he was on, that is, the 1890 and 1895 Creek authentications rolls, as we called them; all of that information we could get from the rolls without outside information. We couldn't tell the family relationship from the tribal rolls, but that was information which was put on the card if we could get it when identifying a citizen.

On the last two days before the treaty was ratified we didn't consider it necessary in order to complete a card showing identification of a citizen to show on that card whether he was living or dead. The date for the ratification of the treaty had been agreed upon among the members of council, that is, May 25, 1901, and the Commission found that there was a large number of people on the Creek tribal rolls who had not been accounted for and something had to be done to preserve their rights for them if they had any and were living, so the last two or three days before the treaty was ratified we took the 1890 and 1895 rolls and put everybody on a census card who was on those rolls unaccounted for unless we had information at that time that they were not entitled to enrollment. This was done on the theory that the treaty provided that no person could be enrolled after the ratification of the agreement.

91 We put them on because of the theory that if they were not entitled to enrollment they could be stricken from the roll afterwards upon investigation as to whether or not they were living April 1, 1899, then if any investigations were made as to whether they were living April 1, 1899, or not and that fact determined by the Commission it would either have appeared on the census card, or if sworn testimony was taken it would have been transcribed and the record preserved, that was the universal rule and practice of the Commission. I don't remember of a case where there was a contest as to citizenship rights but that testimony was

en and reduced to writing. In cases where there were trials contests evidence was taken and preserved; in cases in which there was no trial or hearing of contest and where there was no evidence preserved the record was made up by noting on the card ink if they enrolled a deceased citizen. If they knew at the time the roll was made that he was dead it would be noted on the card ink. If the census card was complete and contained no notation that the citizen was dead that would indicate that he was living at the time the card was made; the fact that he was on the roll and there was no notation made that he was dead, then he was presumed to be living. I don't mean to say that that notation was made on the tribal roll, it was made on the census card.

I have no recollection at this time about the enrollment of Barney Thlocco at Okmulgee, that is no independent recollection of that enrollment. I have seen the tribal roll containing the name of Barney Thlocco. The notation in pencil opposite his name "died in 1906" the 1895 tribal roll I have seen. I probably saw it at Okmulgee the time he was enrolled there, and I saw it again today. Such notation as that on the tribal roll meant that the clerk making enrollment should be on his guard and make inquiry, that is all meant. It meant that somebody had furnished, in that case Mr. Perkins, information that that party was dead, or whatever notation was made on the roll, but it simply served to put the Commission on their guard and suggested further inquiry, further investigation. Looking at the census card of Barney Thlocco and eliminating those red lines which were put on there in 1906, there is nothing on that card to indicate whether he was living or dead on May 1901, nor to indicate whether or not an investigation was made afterwards as to his death. I want to modify that by saying that the card itself as made out would indicate that he was alive on May 1901, when you eliminate the notation "No. 1 stricken from approved roll by authority of Department December 13, 1906."

The party left Okmulgee within a few days after the treaty was ratified on May 25, 1901. I don't think any further work was done over there in the matter of enrollment after that. I think the last day upon which any enrollment work was done at Okmulgee was on the 24th day of May, the day before the treaty was ratified.

On cross examination said witness testified substantially as follows:

I was not in the enrollment-division except occasionally. My business was confined to the allotment division and the management of allotment contests. I don't know what the custom [—] the clerks were out there except as to where I had personal knowledge of what they did and what they did. I know how Mr. Merriek did it. I was there when he fixed a few cards and know what the custom was, without looking over the cards I can't tell you any case which he fixed in the way which I say he fixed it. If I were to see the cards I could tell you every one that he made out. He made out this

card it is in his handwriting and it appears to be a completed card. The cards that were incompleated were left incomplete because we could not get all the information that we wanted to put on the cards. Those that were complete, whether we called it complete or not, were filled out from information that we got from some place. This is a completed card which has been offered in evidence here and presented to me for examination with reference to the enrollment of Barney Thlocco appears to have been made out from information given from somebody. I am not familiar enough with the old census cards to say whether all the information on this new card could have been obtained from the old census cards and the tribal rolls or not. The age on the old census card is 40 and the postoffice address is Sac and Fox Agency; the age on this last card is 35 and the postoffice address is Arbeka.

"Q. Now could you tell whether or not the clerk in making up this last card got some additional information over and above what was on the first card?

By Mr. Davidson: We object to that as purely speculative.

By Mr. Stuart: Your honor, I am cross examining this witness.

By the Court: They are cross examining.

By Mr. Davidson: Exception.

A. Yes, he certainly must have."

That indicates to me that the man making out this last census card got information some place.

93 "Q. As a matter of fact, Mr. Lieber this card shows that the man made an investigation independent of the first census card, don't it?

A. Judge I will say that on that date, the 24th day of May and the day before that, there was no investigation made of anybody's enrollment except information that was voluntarily given there by the Town Kings or somebody that was present. We hadn't time to investigate.

Q. Well then I will leave out the word investigate; I will say didn't *he* get some evidence?

A. Yes, he got some information from somebody.

Q. He got then some information independent of the first census card and by that information, independent of the first census card, he made out the last census card, didn't he Mr. Lieber?

A. Yes, sir."

Yes there is a notation on the 1895 roll "died in 1900" I think it is died and not dead. Yes, sir, this roll was available to the clerks every minute and hour during the day. They did not go to it to find out the quantum of blood but to find out what was on it. I don't think it shows the blood. That roll was apparently there in Okmulgee. That notation meant that information was furnished that he died in 1900. Yes, sir, I told the court a minute ago that that notation was to put the clerk on inquiry, he was to investigate it—on inquiry as to anything affecting the enrollment of the applicant. It was to put the clerk on information that Mr. Hopkins had been informed that he was a dead man, and that would necessitate

examination on the part of that clerk, if he does his duty, to find whether he was dead and when he died, if he had time to do it. It was dead it was an invitation to him to make an investigation any time except those last two days before the treaty was ratified. Withstanding the fact that his notation was called to the attention of the clerk and was an invitation to investigate; notwithstanding the fact that the clerk gave him a full census card showing everything necessary on the full card I say he didn't investigate as to death because if he had had any positive information of the death of that party he would have noted it on the card and would have sworn an affidavit. It was Mr. Merrick's custom when he had positive proof of the death to make a notation on the card that he wrote

In case he had proof of the death but not proof of the date of death, that is, that he died after April 1, 1899, but didn't know whether it was April, June or July he would put it on there in pencil. If he didn't have positive and complete information he would put it on in pencil. I stayed with the Commission a long time after the census cards were made out, and followed this work a long time. I can't tell you whether when these census cards that we made out at Okmulgee were passed up to the

Commission, the Commission thereafter investigated every one of them before they scheduled them and sent them to Washington, because I wasn't working in that department. Their custom was to investigate every man, of course, that they put on the

Their custom was to investigate every one of these census cards that we made out there before they sent them to Washington. The final and they got all the information they could from every place they could, even after the cards were made out. It was their custom to do that before they sent the schedule of names to Washington.

The last two days there at Okmulgee the town kings were at the council and were in our office frequently, as were also different men from the different towns, giving information as to what they knew about those Indians. I think the Creek attorney at that time was B. Dawes. I can't say whether he was there. In those days the Creek Nation had a commission that attended to those enrollments, I think it was there. The members of the Dawes Commission at that time, except Mr. Bixby and Mr. Breckenridge, are dead. I really don't know whether Mr. Breckenridge was at Okmulgee or not.

On redirect examination said witness testified substantially as follows:

The discrepancy between the old census card and the new census card in the matter of age and postoffice address which indicates that information had come to the party conducting the enrollment work, does not indicate that any information had come as to Thlocco's death. All I know as to the making of the final rolls that went to Washington is as to how they were made, I did not assist in making the final rolls.

Witness excused.

And thereupon TAMS BIXBY being called on behalf of the Government and sworn on oath testified on direct examination in substance as follows:

My name is Tams Bixby, I live in Muskogee. In 1899 I was a member of the Dawes Commission, at that time I believe I was acting secretary, and I was a member of the Commission in May, 1901. I do not remember whether I was chairman or acting chairman at that time, but I was one or the other. In May, 1901, the Commission was composed of myself, Mr. McKennan, Mr. Needles and Mr.

Dawes, I think. In May, 1901, there was an enrolling party
95 went from the Commission to Okmulgee for the purpose of listing names of Creek Indians for enrollment. I was there.

I do not remember whether any other members of the Commission were there, but I think not. My best judgment is that they were there but did not stay. They may have come and gone. I was there on May 24, 1901. I can't say whether any other member of the Commission was there on that day. P. B. Hopkins was then in the employ of the Commission as a clerk. My recollection is that Edward Merrick and Mr. Hastain were there, but I am sure I don't remember whether John G. Lieber was or not. They were doing the general work incumbent on the party as clerks. By the term listing for enrollment we mean the preparation of census cards. We were putting names of citizens on cards. Referring to Government's Exhibit No. 1, which appears to be a photographic copy of the census card on which the name of Barney Thlocco appears, I have no recollection of any evidence of any character being presented to me the time of the preparation of that card on May 24, 1901, showing whether or not Barney Thlocco was living on April 1, 1899. If evidence had been presented to the Commission and considered at that time on the question whether Thlocco was living or dead and the Commission had decided it, we would not subsequent to that time have initiated an investigation I don't believe unless some matters had been brought to our attention which required an investigation. I don't know that anybody would have any more information concerning this particular matter now being inquired about by the court than myself, but I don't know what information they might have, but my judgment would be that there would not be any person that would have more information than me. I don't think of anybody that would have more information about this matter than I have.

On cross-examination said witness testified substantially as follows:

It really makes no difference whether I was chairman or acting chairman of the Commission, I was really chairman anyway. We went to Okmulgee for two purposes, first, to assist in the ratification of that treaty, for personally we wanted the treaty ratified, and second, to enroll those Indians, there were some Indians who had not been accounted for and we took our force to Okmulgee for the purpose of investigating and ascertaining who were entitled to enrollment. Yes, we had an enrollment clerk by the name of Hastain and

ther by the name of Merrick, who wrote out these cards. I was there a week or two of the time is my recollection. I wouldn't say that before any card was released as final I would get these men together and go over the list, but I went over the at different times, sometimes with one clerk and sometimes with other. I would get the clerk that made a particular card and go r it and before that card became effective I satisfied myself that man was entitled to enrollment. In most every case I satisfied self outside of the rolls (tribal rolls) some sort of information side of the rolls. A good many of those men were listed—en- led when we left Okmulgee and cards were completed, and some re not and we left them for subsequent identification. We went o a subsequent investigation as to those whose cards were not com- te and determined the facts as to them. I did not, to my knowl- ge, ever enroll any man without taking some evidence, informa- n or eliciting some knowledge from some source other than the ls (tribal rolls) that he was entitled to enrollment and I never mitted it to be done. My purpose was to find out whether a man s entitled to enrollment and one of the factors in that determina- n was whether he died prior or subsequent to April 1, 1899. I ways ascertained that fact before I enrolled him. I always satisfied y mind on that subject by evidence outside of the roll. (Here coun- y hands witness defendant's Exhibit No. 3 and witness examines me.) I can't remember this letter. It says, "Acting Chairman." I don't know whether I ever signed it or not. I wouldn't say, it pur- ts to be signed by me. I [It] appears to be a letter from the ommission. It appears to be a certified copy. (Witness reads letter himself.)

Defendant's Exhibit No. 3 is in words and figures as follows, to- it:

DEF'TS' EX. 3—Eq. 2017—5/7/15.

Copy.

MUSKOGEE, IND. TER., March 3, 1902.

The Honorable the Secretary of the Interior, Washington, D. C.

SIR: The Commission transmits herewith, for your approval, par- al roll of citizens by blood of the Creek Nation, numbered 8313 to 018, inclusive, whose names have been regularly listed for enroll- ment on Creek Indian cards, numbered 2878 to 3227, inclusive, who ere living on the first day of April, 1899, or born to citizens so en- tled to enrollment, up to and including the first day of July, 1900, nd then living, as provided by Act of Congress, approved March 1, 1901, and are found either upon the 1890 or 1895 authen- 7 ticated Creek Rolls, or who are descendants of persons whose names are found upon said rolls, born since said rolls were made; or were admitted to citizenship by the Commission to the Five Civilized Tribes, or by the United States Court on appeal under he provisions of Act of Congress approved June 10, 1896, or who re descendants of persons so admitted, born since such admission;

or were duly and lawfully admitted to citizenship by the Creek National Council, or by the legally constituted Commissions and Courts of said Creek Nation, or who are descendants of persons so admitted, born since such admission.

Here follows, in same order as roll, table showing tribal enrollment (if found on rolls), and such other data as will enable complete identification of all:

No.	Name.	Roll.	Roll.	Town.	Remarks.
*	*	*	*	*	*
8592	Thlocco, Barney	1890	1895	Tukabatchee	
*	*	*	*	*	*

The Commission, after having thoroughly examined the rolls of the Creek Nation, and such evidence as has been submitted, touching the identification of the persons on roll herewith submitted, is of the opinion that all are entitled to enrollment as Creek citizens by blood, and should be so enrolled.

Respectfully submitted,

COMMISSION TO THE FIVE CIVILIZED TRIBES.

— — —, *Acting Chairman.*

T. B. NEEDLES, *Commissioner.*

C. R. BRECKENRIDGE, *Commissioner.*

Through the Commissioner of Indian Affairs.

Department of the Interior, Office of Superintendent for the Five Civilized Tribes.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians and the disposition of the land of said tribes and that the above and foregoing is a true and correct copy of letter press copy of a letter from the Commission to the Five Civilized Tribes to the Secretary of the Interior, dated March 3, 1902, transmitting a partial roll of citizens by blood of the Creek Nation, in so far as same pertains to the enrollment of Barney Thlocco, at roll No. 8592, which portion of said

letter press copy is found in letter press copy book No. 1, at
98 pages 340, 351 and 367.

GABE E. PARKER,

Superintendent for the Five Civilized Tribes.

May 5, 1915.

"Q. Mr. Bixby, I will ask you whether that portion of the letter which you have just read was the character of statement you generally made with reference to schedule of names when you sent them to Washington to the Secretary of the Interior?

By Mr. Linebaugh: Just a moment, we object to -is as incompetent and inadmissible.

By the Court: That may be admitted.

By Mr. Linebaugh: We except.

A. Yes, sir, that is the character.

Q. Now assuming that that statement in there was the statement you generally made in writing these letters will you now state to the court whether or not you returned a schedule of each and every name to the Interior Department?

By Mr. Linebaugh: Just a minute, we object to that as incompetent and inadmissible.

By the Court: Overruled.

By Mr. Linebaugh: Exception.

A. Yes, sir.

Q. And when you returned that schedule I will ask you if as a matter of fact, you didn't advise the Department you had made a full and complete and perfect investigation of each and every case?

By Mr. Linebaugh: We object to that as incompetent and inadmissible.

By the Court: I think it is proper cross-examination.

By Mr. Linebaugh: We except. The court does not care for us to find any further reason.

By the Court: If you have any further reasons I will hear them.

By Mr. Linebaugh: If the court is satisfied.

By the Court: I am satisfied this is proper cross-examination.

A. Yes, sir.

Q. Then if you did Mr. Bixby when you sent every schedule to the Department state if that is what you stated that you had made a complete and perfect investigation of each and every case and did you mean that you had satisfied your Commission that each and every one of those men were entitled to enrollment?

99 By Mr. Linebaugh: We object to that as incompetent and inadmissible.

By the Court: Overruled.

By Mr. Linebaugh: Exception.

A. Yes, sir.

Q. Then as a matter of fact Mr. Bixby, every name you sent into the Department of the Interior as a name to be enrolled and which had been enrolled as a member of the Creek Tribe has been investigated by some member of your Commission at some place and by evidence outside of the rolls a determination had been reached that that person was entitled to enrollment, ain't that so?

By Mr. Linebaugh: If the court please we object to that.

By the Court: He has asked if, as a matter of fact that state of facts existed. I think the witness may answer if he knows.

By Mr. Linebaugh: Exception.

A. Yes, sir, that is my opinion, my view.

Q. Don't you know it is a fact?

A. Yes, I know it is a fact.

Redirect examination by Mr. Linebaugh:

Q. How do you know it is a fact?

A. Well, I know it like I know any fact that I know. I know I was on that job all the time and I was satisfied that every name on the rolls was entitled to be on the rolls.

Q. Can you point out Mr. Bixby, or is there now in your mind any knowledge — any evidence that you received as to Barney Thlocco?

A. No, sir.

Q. Have you any knowledge at this time of any evidence of any character that you received as to whether Barney Thlocco was living April 1, 1899?

A. I haven't any recollection of anything now."

It is my recollection that at Okmulgee several incomplete cards were made and while I haven't refreshed my memory, yet as I remember it the treaty then under consideration contained a provision that after the ratification thereof no name should be added to the rolls of Creeks, and we were anxious to protect everybody's right that should be protected by listing them for enrollment. I have no recollection of making any agreement with the Creek council. The treaty then pending contained the provision I have mentioned and we listed such names as we had no information about for the purpose of

100 further identifying them later, getting such information as we could as to whether they were living or dead. Both before and after May 24, 1901, we were investigating all the time as to those persons whose names we listed on uncomplete cards. I have no doubt but what we would subsequently conduct an investigation as to those whose census cards were incomplete or as to the particular ones who we then listed as unaccounted for, not as to them only but we investigated all the time everybody that there was any doubt about. We certainly would have conducted an investigation upon our own initiative subsequent to that time with reference to the date of death, or the death, or the question as to whether a person was dead, even if at that time we were satisfied on that point, if anybody called our attention to it and said it should be done, any Creek attorney or town king or anybody that had any interest in the matter. For several days before May 25, 1901, we were listing unaccounted for names. We didn't know just when the treaty would be ratified. We were engaged in that work on May 25th and also in listing people that we did not have information about. If any man could be fully listed and enrolled we would do that of course, that is what we were there for. There would accompany each of the lists about which counsel have inquired from one name upward to sometimes hundreds, frequently as many as 500, as I recall it the schedule varied in size. Referring to the Barney Thlocco census card I would state that I am unable to say from reading it, or from recollection, when I determined that he was entitled to enrollment.

"Q. State from an examination of that card whether or not from

it your Commission could have determined whether on the day it was made, May 24, 1901, Barney Thlocco was living or dead?

A. Only from the fact that it was on the card and it had been presumably investigated as most of the Creek enrollments were verbally, verbal investigation by the clerk or the Commissioners. Frequently I sat with the clerks and other commissioners did and sometimes the clerks took the information by themselves.

Q. My question is whether or not from the card that fact could be determined?

A. I said it could not except from the information put on the cards.

Q. State whether from an examination of that card your Commission could have determined that Barney Thlocco was living on April 1, 1899?

A. Not from the writing on the card as indicated by the mere letters and figures.

Q. State whether there is any other record anywhere to your knowledge by which your Commission could have determined either of those two things, that is whether he was living on April 1, 1899, or May 24, 1901.

A. I know of none.

Q. Then the card could have been complete without any reference to the death of Barney Thlocco?

A. It could not in my judgment have been complete. Suppose it would be possible.

Q. Well it is now complete without reference to that isn't it?

A. Well, that is a matter of opinion.

Q. Is it now complete and as it was on May 24, 1901?

A. I expect it is, yes, sir."

I undoubtedly satisfied myself from an examination of that card whether Thlocco was living on April 1, 1899, and on May 24, 1901. I could not do that so far as the letters and figures on the card are concerned, but the fact that there was a card would satisfy me. There were thousands enrolled the same as those on this card. The Commission had every record available to go by for the separation of the lists in sending them to the Secretary. I have no recollection what we had in this case except this card.

On further cross examination said witness testified substantially as follows:

We had field parties out all the time and they were instructed to report on these facts from time to time as to when men died and all about it. We spent thousand- and thousand- of dollars getting that information. We kept no record of testimony, only when there was supposed to be a contest or likely to be, outside of that on the cards. We acted on the best information we could get.

"Q. Sometimes it was hear-say, sometimes direct, sometimes from the town king, sometimes from inhabitants near the party sometimes report made by your field men? You took the best information you could get?

A. We had the assistance of the best men in the tribe as well as our own field parties."

On redirect examination said witness testified substantially as follows:

"Q. How would that information get to your Commission for consideration?

A. Why frequently we heard it ourselves. I heard a great deal of it.

Q. Suppose you didn't hear it?

A. Then we took the judgment of the clerks on the cards. Unless it was called to my attention or to the attention of some Commissioner.

Q. I believe you answered counsel that many thousands of dollars was spent by your Commission in sending parties out to obtain information?

A. Yes, sir.

Q. You, of course, could not carry their reports in your mind?

A. No, we did carry a good many of them.

102 Q. Why did you have to, Mr. Bixby; state whether or not it is true that you required all of those persons to submit to your Commission the written result of their investigation?

A. Frequently only a memorandum and frequently it was made by full-blood Indians who couldn't write English or couldn't take shorthand reports and we could get nothing from them but verbal reports.

Q. Evidence gathered in this manner how did that information get to the Commission?

A. Frequently it was reported to the clerks and frequently to the Commissioners.

Q. Verbally?

A. I took some of it myself.

Q. In the Barney Thlocco case did you take any?

A. I have no recollection about the Barney Thlocco case whatever I haven't the slightest recollection about it.

Q. Mr. Bixby, after this activity and expenditure on the part of the Commission, state whether or not the Commission itself and its employees would take written memorandums of information that they received so as to preserve it?

A. Sometimes, yes, sir, a great deal of it was taken that way."

I remember we had 2,000 pages in one case. Sometimes we didn't make any memorandum. At the start it wasn't thought necessary. I remember when we started the Creek enrollment that we started to take data on scratch blocks, that was when we first started in the Creek Nation down at the old court house in the fall of 1897 and winter of 1898, I think it was, I don't remember just the date and we found that that was undesirable data to take for enrollment—"as a matter of fact you know no Indian had ever been enrolled like they were here. They generally herded them up in the wild tribe and just checked off a roll. Mr. Hopkins devised the card which we use now afterwards as that was about all we used in the Creek Nation."

took some testimony in the Creek Nation. It was taken on various questions, to identify the people and find whether they were entitled to enrollment and whether they were living or dead on certain dates.

Referring again to the Barney Thlocco card, I could not state to the court whether or not he is living today or dead if I didn't give confirmation to the notation made on the card in 1906.

On examination by the court said witness testified substantially as follows:

I think I examined every card in the Creek Nation myself personally, every one probably more than once. That examination took place in the office at Muskogee after the card was made. The practice was with regard to that examination was to read the card and check it with the roll (tribal roll) or any other information that there might be, or if anybody had presented any suggestions either verbally or in writing, they were taken into consideration and examined and probably field parties were sent out. We made a list of names that were questioned and sent field parties out for them to see whether they were living or dead. Sometimes there was a question as to whether — weren't too many children on a card. The Creek families would get mixed up about the children sometimes — various matters would come up which required investigation which was conducted from time to time. In the Creek Nation I believe I examined every card personally, of course, not always in detail, because there were too many of them to do that.

On further redirect examination said witness testified substantially as follows:

There were somewhere around 18,000 Creeks enrolled. In all the five tribes there was something over 102,000. The enrollment of the Creeks covered a period of about 8 years, or 9 years maybe, and the other tribes covered the same period. We were enrolling the other tribes at the same time we were enrolling the Creeks, but we got the Creeks pretty well along before we started the others. The major part of the Creeks were enrolled during a period of something like 2, 3 or 4 years.

On further cross examination said witness testified substantially as follows:

As a matter of fact when I would take this card I would have the clerk and the clerk would have the schedule. When I took the card I went over it several times with the clerks and would find from the clerk all the information that he had with reference to that card several times. I expect I have talked with the clerks about every card more than once.

Witness excused.

By Mr. Linebaugh: If the court please I now offer in evidence a certified copy of certain testimony taken by the Commission

to the Five Civilized Tribes October 16, 1903, in the matter of an accounting for those persons whose names appear on the Creek Tribal rolls who died prior to April 1, 1899, and are not shown on said rolls to be otherwise accounted for, and particularly that portion of that testimony being the testimony of one John A. Jacobs, to-wit, on October 16, 1903, with reference to Barney Thlocco.

104 By Mr. Stuart: We object to that your honor, that was taken after the certificate of allotment had been made and what relevancy can it have now? Purely ex parte without notice.

By the Court: What is the date of that?

By Mr. Davidson: October 16, 1903.

By the Court: The date of the allotment in this case was 1902.

By Mr. Davidson: Yes, sir.

By the Court: The date of the recordation of patent was what?

By Mr. Davidson: March, 1903. Approved in April, 1903, and recorded afterwards.

By Mr. German: Let us have it identified your honor as Government Exhibit Ten.

By the Court: Let me examine it.

By Mr. German: We don't offer it for the purpose of showing anything other than this your honor, that they were investigating a thing which they had not investigated before. We will put a witness on the stand to prove that this is the only record there showing any information which they received, any evidence which they received on that question—any inquiry they made. Now they made it after they had enrolled him. Therefore, it is a circumstance showing that they had done the thing that they should have done before the enrollment. Why were they now doing it? I think it is competent as a circumstance.

By the Court: I will let you offer the witness to whom you refer and see whether that changes the situation in any way. The ruling on this will be reserved for the present and if you desire you may put on the witness to whom you refer and I will see whether or not his testimony in the first place is competent and if it is whether it makes any difference in the situation."

Whereupon CHARLES H. DREW was called and sworn as a witness on behalf of the complainant and testified on direct examination substantially as follows:

My name is Charles H. Drew. I am clerk in charge of the enrollment records of the Superintendent for the Five Civilized Tribes. I have searched the records in the office of the Commission with a view of finding all papers and records pertaining to the enrollment of Barney Thlocco up to date of the approval of his enrollment in March, 1902. There is one census card which we call

105 the old census card and the census card which we use now and the approved roll and the two tribal rolls, the 1890 and 1895. I have been unable to find any other documents or papers there up to the approval of the enrollment. Subsequent to the date of the approval of the enrollment in March, 1902, and prior

to the date of the investigation made on the reopening of the case in 1904, I find the testimony given by the town king in 1903, if I am not mistaken as to the date. This (referring to Government's Exhibit No. 10) is a copy of it.

By Mr. German: Now your honor we renew our offer of this exhibit No. 10.

By the Court: I admit it.

By Mr. Stone: Note our exception.

By the Court: Merely as a circumstance bearing on the record for the court to consider in connection with all the other evidence for whatever it may be worth, if anything. Exception noted.

Government's Exhibit No. 10 is in words and figures as follows:

Gov. Ex. 10.

5/7/15—Eq., 2017.

Department of the Interior, Commission to the Five Civilized Tribes.

OKMULGEE, I. T., October 16th, 1903.

In the Matter of the Accounting for Those Persons Whose Names Appear on the Creek Tribal Rolls Who Died Prior to April 1st, 1899, and are not Shown on said Rolls to be Otherwise Accounted for.

JOHN A. JACOBS, being first duly sworn by R. R. Cravens, notary public, testified as follows:

By the Commission:

Q. What is your name?

A. John A. Jacobs.

Q. What is your postoffice address?

A. Holdenville.

Q. What is your age?

A. 32.

Q. Are you Town King of Tuckabatchee Town?

A. Yes, sir.

The object of this examination is to ascertain who of those persons whose names appear on the Creek Tribal rolls of Tuckabatchee Town died prior to the opening of the Creek Land Office. (April 1st, 1899.)

106

1890 Roll.

Q. Lucy Marks—page 227?

A. She died before the land office opened. Lightning killed her.

Q. Samochee—page 227?

A. If it is the one I am thinking of—I am not sure that his name

is Semochee. He is Joe Simmon's son and a half brother of Full Jimboy.

Q. Leho Marty—page 227?

A. He died before the land office opened.

Q. Sarnortken—page 227?

A. I am satisfied she died after the land office opened.

Q. Elumme—page 227?

A. He is dead, but I don't know whether he died before or *after* the land office opened.

Q. Sindy Noon—page 227?

A. She died before the land office opened.

Q. George Kernal—page 227?

A. He died before the land office opened.

Q. Arluck Hopie—page 227?

A. He has filed. His name is probable Aharluck Hopiye.

Q. Salley—page 227?

A. Probably they live near Eufaula, but I have not been able to find her.

Q. Nancy: Willie: Kizey—page 227?

A. I think they belong to the Snake faction. I have never been able to find them.

Q. Micco Chupko—page 228?

A. He is dead, but I don't know when he died.

Q. Richard Bruner—page 228?

A. He died before the land office opened.

Q. Robert McGirtt—page 229?

A. He died before the land office was opened.

Q. Lizzie Robison—page 229?

A. She died before the land office opened.

Q. Kanip Fixico—page 229?

A. Died before land office opened.

Q. Louis Larney—page 229?

A. Died before land office opened.

Q. Lizzie—page 229?

A. She died after the land office opened.

Q. John Nochee—page 230?

A. He died before the land office opened.

Q. Efer Yaholar—page 230?

A. He died before the land office was opened.

Q. Chuckhort Fixico—page 230?

A. He died before too.

Q. Leaner Bruner—page 230?

A. She died before the land office opened.

Q. Yarholochee—page 231?

A. He died before the land office opened.

107 Q. Long George—page 231?

A. He died before the land office opened.

Q. Maxey—page 231?

A. He died before the land office opened.

Q. Lucy Bear—page 231?

A. She died before the land office was opened.

Q. Tulwer Fixico—page 232?

A. He died before.

Q. Sparnemarhar—page 233?

A. He died before the land office opened.

Q. John Leacher—page 233?

A. I was told by John Francis that he say John Leacher in Muskegee after the land office was opened, requesting people not to file on land; that it was a mistake for the Creek people to take allotments. He was an old man.

Q. Tuckabatchee Harjo—page 237?

A. He died long before the land office opened.

Q. Parney Thlocco—page 237?

A. He died during that smallpox up near the Sac & Fox Agency.

Q. Do you know whether he died before that hospital burned or not?

A. No, sir. The one that died was Barney Thlocco, but I guess they got it Parney.

Q. Wm. H. Walker; Susan N. M. Walker; Clisyann Walker—page 239?

A. They lived in the Choctaw Nation.

Q. Are they part Choctaw?

A. I don't know, but I was told since that they were enrolled in the Choctaw Nation.

1895 Roll.

Q. E. V. Burton?

A. I think she was either a Choctaw or a white woman.

Q. J. H. Crabtree?

A. He is dead, but I don't know whether he died before the land office opened or not.

Q. David Kernels?

A. He is dead, but I don't know whether he died before the land office opened or not.

Q. Tuckabatchee Harjo?

A. He died before the land office opened.

Q. James Sullivan?

A. He died before the land office opened.

Q. Lizzie J. Robison?

A. She died before the land office opened.

Q. Chular Harjo?

A. He died before the land office opened.

Q. Lizzie and Liza Harjo?

A. They both died after the land office opened.

Q. Burney Marha?

A. He died before the land office opened.

Q. Louis Larney?

A. I think he died before the land office opened.

Q. Rhoda Lena (Rhoda Lena)?

A. I think she died before the land office opened.

Q. Yarholoche?

A. He died before the land office opened.

Q. Lena Bruner?

A. Died before the land office opened.

Q. John Oche?

A. He died before the land office opened.

Q. Maxey?

A. He died before the land office opened.

Q. Micco Chupko?

A. Died before the land office opened.

Q. Lucy Tiger; Susie Tiger?

A. They died before the land office opened.

Q. Long George?

A. He died before the land office opened.

1895 Omitted Roll.

Q. Nathan Jacobs—Creek Card No. 3331?

A. I think that was enrolled on the omitted payment as my boy but in the meantime my boy was placed on Little Tiver Tulsa.

Q. Was that your boy's name?

A. No, sir, Frankie, but he did not have any name then. But I think Alexander, Town King of Tuckabatchee Town enrolled boy as Nathan Jacobs. I don't think there is any such person. Frank is on Little River Tulsa. He drew money there. If I am mistaken they have it Babe on the 1895 roll, and in lead pencil.

The undersigned, being sworn, states that as stenographer to the Commission to the Five Civilized Tribes he recorded in full the testimony in the above and foregoing matter, and that the above and foregoing is a true and complete transcript of his stenographic notes thereof.

R. R. CRAVENS

Subscribed and sworn to before me this the 23rd day of October, A. D. 1903, at Muskogee, Indian Territory.

[SEAL.]

EDWARD MERRICK,
Notary Public

Department of the Interior,

Office of Superintendent for the Five Civilized Tribes.

MUSKOGEE, OKLAHOMA, — — —

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of carbon copy of testimony taken at Okmulgee, Indian Territory, on October 16, 1903, in the matter of account for those persons whose names appear on the Creek Tribal rolls, v

died prior to April 1, 1899, and are not shown on said rolls to be otherwise accounted for.

109 GABE E. PARKER,
Superintendent for the Five Civilized Tribes.

May 7, 1915.

C. H. D.

Cross-examination of the witness Chas. H. Drew by Mr. Stuart:

"Q. You say there was no other record? Didn't you find that letter down there (referring to defendant's exhibit No. 3)?

By Mr. German: This was before the enrollment judge.

By the Court: Let him answer whether he found that letter. I will pass upon the admissibility later.

Q. You found that letter on the record didn't you?

A. Yes, sir, I did.

Q. And you know the contents of it?

A. I do."

By Mr. Stuart: Now your Honor, I want this letter—this letter certainly now is competent as an exhibit.

By Mr. German: We object to it on the ground that it is incompetent, irrelevant and immaterial. I don't appreciate the purpose for which it is offered nor its object. It is not in connection with the cross examination of this witness and counsel are not now proving their case.

By Mr. Stuart: Your honor here is why I offer it as an exhibit to our cross examination. This witness has testified that he found no other records of any kind. He started with the old census card and come down to this document that you read in evidence. It is admissible in evidence to rebut whatever force the record now offered in evidence as to the reopening of this case and as to whether or not it was originally examined.

By Mr. German. Then if it is offered for that purpose your honor, it is not the time to offer it.

By the Court: I think it is competent cross examination here. It will be admitted, exception noted."

Said letter is Defendants' Exhibit No. 3, and is set forth in full hereinbefore.

On further direct examination the said witness testified substantially as follows:

That letter as offered shows on its fact that there are a large number of names left off of it. I should think there were probably 2,000 names left off.

By Mr. Stuart: I will state, your honor, that we just put the name of Thlocco just to show that he was included.

110 By the Court: I understand Thlocco's name is included in this letter which you offer. I so understood.

By Mr. Stuart: Yes, sir, but the other names are not there because it would take a letter as long as this room.

Witness excused.

And thereupon HECKTOR BEAVER was recalled as a witness on behalf of the complainant and testified on direct examination substantially as follows:

I am the same witness who was on the stand day before yesterday, or yesterday. I live a little north of Bristow. I have lived in the Hilliby Settlement. I knew Barney Thlocco for about ten years of his lifetime. He is dead. He lived in the Hilliby Settlement. That settlement is southeast of the town of Stroud.

"Q. Mr. Beaver, how far was your house from where Thlocco——"

By Mr. Stuart: Your honor, we object to this testimony.

By the Court: Yes, it opens the question now as to whether or not the evidence so far offered amounts to a *prima facie* case that this allotment or enrollment was made without evidence:

By Mr. Stuart: Yes, sir. We object to it because that *prima facie* case is not made under the evidence and we are ready to be heard on it if your honor desires it.

By the Court: Well, that is a consideration of the testimony offered in this case.

And thereupon an adjournment was taken until tomorrow morning at 9:30 o'clock.

And thereafter court reconvened at 9:30 o'clock A. M. April 8, 1915, and the following proceedings were had.

Whereupon argument was heard by the court.

By the Court: Gentlemen, I don't think I care to take up further time with this matter. It has been gone over thoroughly. I have considered every phase of it. In my judgment if the contention of the Government is sound it means that these thousands of allotments and patents which have been issued here upon the faith of the enrollment of the Commission to the Five Civilized Tribes of these
111 Indians, can now be attacked and set aside by actions of this court, merely upon a showing that the Commission although finding, for instance in the case of the Creek Nation, that the allottee was living April 1, 1899, made a mistake and that inasmuch as they made that mistake it developed upon this court to re-try that issue. I may be wrong but as I view the law that would be a holding contrary to the law, contrary to public policy and a holding which I cannot make in this case.

By Mr. Linebaugh: May I make another suggestion?

By the Court: I think the matter has been argued. Take your exceptions. I am so clear on that proposition that I am willing to stand on it until the Circuit Court of Appeals says otherwise.

By Mr. Davidson: This is a ruling now on the offer we made yesterday?

By Mr. Linebaugh: I understand the court is not making of record any ruling at this time.

By the Court: I am going to announce my view of what the Government has sought to establish by the evidence offered in support of its contention that the Commission acted without evidence in enrolling Barney Thlocco. Last night or yesterday evening when the court adjourned the evidence of the Government had just closed in relation to that allegation of the Government's bill that the enrollment of Barney Thlocco had been made by the Commission to the Five Tribes without any evidence whatever relating to the fact as to whether he was alive or dead April 1, 1899. The court held in a prior stage of the case that it would be necessary, first, in order of proof, for the Government to support that allegation by proof sufficient to make a *prima facie* case. Since the adjournment yesterday evening I have reviewed the evidence in this case, so far as it relates to that feature of the case. The question is: Has the Government made a *prima facie* case on that point? That is, has it by clear and convincing proof shown to the court that the Commission acted in enrolling Thlocco without any evidence whatever. If the proof, on the other hand, clearly convinces the court that it did have evidence, or if the proof is such as to leave the court's mind in a state of doubt as to whether there was evidence or not, in my judgment the Government has failed to establish that *prima facie* case. I have examined, as I say, the evidence of all these witnesses, Mr. Merrick, Mr. Hastain, Mr. Hopkins, Mr. Bixby and Mr. Lieber in particular. Mr. Merrick's testimony in view of the fact that he himself made the card, probably affords the court the most direct light upon the controversy. A very significant feature of the case as developed by Mr. Merrick's testimony and as developed by a
112 comparison of the census card as made by him on May 24, 1901, with the old census card is this: That whereas the evidence differs that in other instances, a greater or less number of instances, the census cards which were made on that date and on the prior days in May were made from the tribal rolls and the census card, in this case it clearly develops that the census card which Mr. Merrick made must have been made on evidence outside of and in addition to the rolls and the old census card, for the reason that the age of Barney Thlocco and his post-office address is given as different from that which appeared on the census card. It follows, therefore, that as to those particular statements there must have been before Mr. Merrick evidence in addition to that contained in the documents to which I have referred. It doesn't follow as a matter of positive conclusion that that evidence affected the question as to whether Barney Thlocco was living or dead April 1, 1899, but it does show that Mr. Merrick in the case of that card didn't just follow the rolls and the old census card and take no further evidence whatever. There must have been before Mr. Merrick some investigation outside of those documentary features. The evidence is clear here that at the time these cards were made up, Barney Thlocco's as well as the others, the Commission with its large force was there securing as far as it could evidence sufficient to enable it to complete these census

cards which were to become the basis of the schedules which would finally be forwarded to the Secretary for his approval and make up the roll. There was the tribal council in session, the Town Kings were there. The evidence clearly shows that they had access to the Town Kings, that they had parties out bringing in evidence. That the evidence in enrolling the Creeks was largely, almost entirely, except in contest cases, oral and not made a matter of record, so that unfortunately we have not now here any record to show what was before the Commission, but in view of that and in view of the evidence here the court can't say as a fact—can't find as a fact that there was no evidence before the Commission on that day or that there was no evidence at some subsequent time pursuant to investigation which the Commission made, and made before the schedule was made up and forwarded to the Secretary, can't find as a fact from the evidence in this case in my judgment that there was no such evidence. There has been offered in evidence here and permitted to become a part of the record the proceedings of October 16, 1903, which appears to have been in the course of an examination with regard to certain unaccounted for Creeks, a great number of them. It appears that when the Town King was being examined that he was questioned with regard to Barney Thlocco's name on the roll and

113 he speaks of him as Barney Thlocco on the 1890 roll. As Barney on the 1895 roll. He is asked with regard to his death in relation to the burning of a certain hospital or house of some character. There is evidence that that is a circumstance to show that that was the investigation, and the only investigation which the Commission ever made with regard to the question of Barney Thlocco's existence on April 1, 1899. That was permitted as a circumstance, but when considered in connection with the evidence of Mr. Merrick, Mr. Hastian, Mr. Bixby and Mr. Hopkins with regard to the manner in which this enrollment was handled, the statement of these gentlemen, offered by the Government, their positive statements that there must have been evidence with regard to Barney Thlocco's existence April 1, 1899, or his name would not have been forwarded for enrollment; in view of those statements the court cannot find that this evidence clearly and convincingly establishes the fact that there was no evidence prior to the time the schedule was forwarded. If that is true as I view the province of this Commission, it was made an agency of the Government to determine the question of Barney Thlocco's right to enrollment, and when that question was determined and the questions of fact determined by that Commission necessary to establish his right to enrollment, those questions of fact when the enrollment is approved by the Secretary of the Interior stand as determined for all time, in all courts until they are attacked because of having been based upon fraudulent testimony or having been arbitrarily found without any testimony. I may be wrong. I have heard arguments for two days in this matter. Of necessity counsel on the contending side disagree, but that is my judgment in the matter, and in view of the prior holding of the court and in view of the conclusion which I reach from this evidence, in my judgment, the Government has failed to establish the *prima facie* case with

regard to the lack of evidence as to the existence of Barney Thlocco April 1, 1899, and, therefore, is not permitted to now inquire into the fact as to whether or not he was in fact living. That is the view I take of this case, gentlemen. I had just as well announce it now.

By Mr. Davidson: So that the objection to the last question propounded will be sustained.

By the Court: The last question probably was in relation to that feature whether he was living or dead if it is, it would be sustained; your record may be made upon those objections.

By Mr. Davidson: Exception.

By the Court: Exception noted.

114 By Mr. Linebaugh: We may complete our record by making such offers, I presume.

By the Court: Yes.

By Mr. German: We offer to prove by this witness Hector Beaver and by other witnesses in attendance upon the court, to-wit: Figey Blueford, Ben Combest, Jim Combest, A. B. Comer, W. A. Christie, Martin Daugherty, Dan Dirt, J. J. Evans, Ben Hoter, Billie Johnson.

By Mr. Stone: Your honor we object to reading the names of a cloud of witnesses into the record.

By the Court: Objection overruled. The offer will be received.

By Mr. German: Dave Knight, Party, Lee Patrick, August Polk, Alonzo Polk, John Summers—

By the Court: Now Mr. German probably the record might be shortened there if you desire to state the number of witnesses.

By Mr. German: I only have three more, your honor.

By the Court: All right, then you may name them.

By Mr. German: Charlie Swift, Milannie, Thomas Vanderslice, Pete Washington, and others whom we have produced, and by records and documentary evidence, the following facts: That Barney Thlocco in whose name the patent was made in this case died on or about the 10th day of January, 1899, at the age of from forty-five to fifty years and prior to the 26th day of January, 1899; that Barney Thlocco was a resident of the Creek Indian settlement known as Hilliby where he had resided a number of years prior to his death; that said settlement is situated in what is known as Tuckabachie Town of the Creek Tribe of Indians and of which Barney Thlocco was a member. That during the winter of 1898 and 1899 the small-pox broke out in the Hilliby Settlement, which disease at that time was supposed and believed by the Indians to be black measles and was so believed by them to be black measles until the 26th day of January, 1899. That on the 26th day of January, 1899, Lee Patrick, the then Indian Agent of the Sac and Fox Agency near the Hilliby Settlement was directed by the Secretary of the Interior to take steps to eradicate this disease among the Indians; that Mr. Patrick made inquiry and found the disease to be small-pox and established a pest camp in the settlement to which all the Indians affected with small-pox were removed; that the establishment of this pest camp was on the 26th day of January, 1899; that this pest camp was maintained until the eradication of the disease among the Indians

in the spring of 1899; that Barney Thlocco died about two
 115 weeks before the establishment of this pest camp; that he was
 either the first or second Indian to die of this disease; that
 the first Indian to become afflicted therewith was Figeys Blueford;
 that Barney Thlocco was a prominent Indian, and that *is* was widely
 generally and well known among all the inhabitants of this com-
 munity that he died before the establishment of the pest camp on
 the date aforesaid; that a large number, approximately seventy-five
 of the Indians in the community died of the disease during the
 prevalence of this epidemic; that the official record of the small-pox
 camp kept by the Indian Agent Patrick will and does show that only
 one of such Indians died after April 1, 1899; that the name of
 this Indian who died after April 1, 1899, was Osar-heneka; that
 the Indian Agent Patrick, who was then the Indian Agent at the Sac
 and Fox Agency, was an employee and representative of the Depart-
 ment of the Interior of the United States. That the following named
 Indians, to-wit: Tuskegee Harjo, Arch Johnson, Jimmie Deer, and
 Sam Laslie attended the burial of Barney Thlocco, one of them hav-
 ing made his coffin and others of them having dug his grave, and
 buried him; and that these same persons afterwards were taken with
 the small-pox and removed to the camp and that all of them except
 Tuskegee Harjo died during the month of February, 1899, and that
 Tuskegee Harjo died January 27th, 1899; that all of the members
 of the Barney Thlocco family consisting of himself and three chil-
 dren died about that time except Thlocco himself in the pest camp
 established in Hilliby shortly after the establishment thereof and
 during the month of February, 1899, Thlocco himself having died
 at the time as aforesaid. That Barney Thlocco's only living brother
 died during this time about the month of February, 1899, after hav-
 ing been present at the death of Barney Thlocco and at the burial
 of Barney Thlocco. That this was the only small-pox epidemic that
 ever occurred in the Hilliby Settlement and that the epidemic left
 very few survivors in the settlement.

By Mr. Stone: We interpose an objection to that testimony, your
 honor, for the reasons assigned.

By Mr. Davidson: If the court please, I understand there is no
 objection to the fact that we haven't put the witnesses on the stand.

By the Court: No, I don't understand that. (Indicating that the
 court does not understand that there is objection because the witnesses
 have not been put on the stand.) Rule 46 provides: (Reads)
 Pursuant to that rule I think the offer made by counsel is properly
 read into the record. It shows the appellate court what the Govern-
 ment offers to prove.

116 By Mr. Shea: The defendants object to the introduction
 of this testimony for the reason that the Government has
 failed to establish its allegation that the finding of the Dawes Com-
 mission was not based upon evidence.

By the Court: That objection will be sustained and the exception
 of the Government noted.

By Mr. German: Yes, your honor, we except.

By Mr. Davidson: The Government now offers the following statement and admission made by the Black Panther Oil and Gas Company in its separate answer to the amended bill of complaint filed October 28th, 1914, to-wit, the following statement in the said answer.

By Mr. Shea: We object to that at this time.

By the Court: Well it is offered, I will have to hear the offer, I will hear you- offer and rule upon it.

By Mr. German: "This defendant admits that there was no controversy or contest of any kind put on before said Commission with respect to the enrollment of said Barney Thlocco or his right to be so enrolled and in this connection this defendant avers that there was no ground for any controversy or contesting the right of said Barney Thlocco to receive an allotment, his enrollment not having been challenged in any manner."

By Mr. Shea: Objected to as immaterial and for the same reason that the objection was made to the other testimony, and further that any allegations by the Black Panther Oil and Gas Company couldn't be binding upon the heirs of Barney Thlocco who are the holders of the allotment.

By the Court: Objection sustained. Exceptions noted.

By Mr. Davidson: We offer now to prove that there was no instrument filed in Creek County where the land is situated in any manner affecting the title to the land until the year 1913.

By Mr. Stone: May I inquire for what purpose that is offered?

By Mr. Davidson: Simply to support our theory that this land was never claimed by anybody at the time the Secretary cancelled this allotment.

By Mr. Stone: We object to that, your honor.

By the Court: Objection sustained. Exception noted.

By Mr. Davidson: Now we offer to prove that a suit was instituted by the United States Government against the unknown heirs of Barney Thlocco, being Equity 1543, on February 17, 1911; that
117 a decree cancelling the patent previously entered on July 29, 1911, cancelling the certificate and patent issued to Barney Thlocco.

That said cause was re-opened upon the application of certain persons claiming to be the heirs of Barney Thlocco and that said cause was re-opened July 13, 1913. That said cause was dismissed by the court upon motion of the Government on November 1, 1913.

By the Court: When the cause was re-opened I take it that the court set aside the former decree and left it standing as a cause for trial isn't that true, that must have been a part of the order.

By Mr. Stone: I suggest that counsel let the offer show that the bill was then dismissed after the decree was set aside that the bill was set aside on motion of the Government.

By Mr. German: On the same day that this suit was filed now on trial.

By the Court: Now I am sure you gentlemen will have no trouble in agreeing upon this statement which is merely a record statement. It is clear that the case was re-opened upon application, as counsel

for the Government has suggested in his offer, of certain parties claiming to be heirs; that the court when the cause was reopened by its order set aside the decree theretofore entered cancelling the certificate and patent. That is true, isn't it? And that subsequent to that time the cause was by the Government dismissed and on the same day this cause was filed.

By Mr. German: Yes, sir.

By Mr. Stone: That is true, your honor.

By the Court: You agree, gentlemen, that that is the record in brief as to this case?

By Mr. Stone: Agreeing that that is the record we object to its introduction at this time.

By the Court: Well they haven't completed their offer at this time.

By Mr. Linebaugh: May I complete it by this suggestion?

By the Court: Yes, sir.

By Mr. Linebaugh: We offer to prove further that the decree rendered by the court in 1911 was based upon service had by the Government by publication addressed only to the unknown heir of Barney Thlocco, and that simultaneous with the entering of the order of dismissal and upon the same day this suit now on trial was filed.

By Mr. Stone: We understand that is correct, your honor.

118 By the Court: Does that complete your offer on this phase of the case?

By Mr. Davidson: Yes, sir.

By Mr. Stone: We object to that because the judgment was void. had been vacated and has no part in this case.

By the Court: Objection sustained.

By Mr. German: We except.

By the Court: Exception noted. Does that complete your offer, gentlemen?

By Mr. German: One moment, your honor, and that will involve putting Judge Angell on the stand. We can make the offer, your honor, without Judge Angell.

By the Court: All right.

By Mr. Davidson: We offer now to prove by W. H. Angell who has charge and custody of the record of the enrollment of the Creek Indians, records of the Superintendent to the Five Civilized Tribes that on July 30, 1913, there appeared before the Commissioner to the Five Civilized Tribes, M. L. Mott, National Attorney for the Creek Nation, and D. H. Bynum, representing the Creek Nation, and also J. Coady Johnson of Wewoka, Oklahoma, and George M. Swift of Wewoka, representing the heirs of Barney Thlocco, deceased, representing the alleged heirs of Barney Thlocco, deceased, at which time and place proceedings were had and testimony taken to obtain a restoration of the name of Barney Thlocco to the rolls of Creek Indians from which his name had been stricken on December 13, 1906, by the Secretary of the Interior, at which time the testimony of a number of witnesses was taken by the Commission in relation to said application.

Mr. Stone: Now to make the record clear, Mr. Davidson, will you state what heirs of Barney Thlocco or claimants to the estate of Barney Thlocco were there personally or by representatives. It is your attention that none of our clients were there and that they were not a part of anything of this proceeding.

Mr. Davidson: We offer to show by the records made by the Commissioner at that time that J. Coody Johnson and George M. Johnson were recorded as present representing the heirs of Barney Thlocco, deceased. That is what the record shows.

The Court: Does the record show the individual heirs represented?

Mr. Davidson: It does not. Representing heir, it doesn't show which heir or who.

By the Court: Well the offer is made, gentlemen.

By Mr. Shea: Objected to for the same reason given before. Material and having no bearing on this case, the Government has failed to establish the enrollment question.

The Court: Objection sustained. Exception noted.

Mr. Davidson: We can state the purpose of this offer.

The Court: I don't think, gentlemen, in the view that I have of this case it is competent in this case.

Mr. Davidson: Then as I understand it counsel don't required to state the purpose of our offer.

The Court: The offer is made, counsel have not requested the case for which it is offered.

Mr. German: Now your Honor, we offer to introduce the whole of Exhibit No. 1 and make a part of the record the notation appearing on Exhibit No. 1, which is the new census card, pertaining to the enrollment of the enrollment, and to prove that that entry was made on or before March 4, 1907, and immediately after receipt of the Secretary's letter directing the cancellation, which has already been read and excluded.

Mr. Shea: Objected to for the same reason as heretofore given.

The Court: Objection sustained. Exception noted.

Mr. German: We offer to introduce the whole of Exhibit No. 2, which is a certified copy of the roll in so far as the same shows the name of Barney Thlocco, and to show that the notation appearing on the roll, "Stricken by order of the Department, December 13, 1906," was made on the official roll pursuant to the letter of the Department dated December 13, 1906, and immediately after the receipt of said letter by the Commission, and prior to the 4th day of March, 1907.

By Mr. Shea: Same objection.

By the Court: Objection sustained. Exception noted.

By Mr. German: We rest, your honor.

By Mr. Stone: May it please the court on behalf of all the defendants and intervenors who appeared in objection to the Government, ask for the dismissal of the Government's bill and a decree in favor of said defendants and intervenors. For the reason that the Government has not made out a case, has not sustained the allegation of its guilt by the evidence.

By the Court: The decree may enter in favor of the defendants dismissing the bill. Exceptions may be noted.

120 By Mr. Linebaugh: If the court please, all of the counsel being present representing the defendants who have joined issue with the general answer we desire at this time to give notice to counsel that the Government will appeal from the decree when entered.

By the Court: The record may show notice of appeal given by counsel for the Government in open court at the conclusion of the trial in the presence of counsel for the defendants.

(The End.)

In the United States Court for the Eastern District of Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT et al., Appellees.

Approval of Statement.

Now on this the 30th day of October, 1915, the above entitled and numbered cause came on to be heard upon the application of the appellant, the United States of America, for the approval of its statement of the evidence and proceedings had and conducted at the trial of this action, and it appearing to the court that this statement was lodged with the clerk of this court on the 14th day of October, 1915, and that notice in writing of said lodgment was given to the respective solicitors of the respective appellees, and that this court, or the judge thereof, would be asked to approve said statement on this date at the United States Court Room at Muskogee, in said Eastern District of Oklahoma, and that said notices were served more than ten days prior to this date, and the court having examined said statement finds that the same is true, complete and properly prepared, and there being no objection made thereto, or amendment thereto proposed, by any party; and it appearing to the court that the appellant desires certain of the testimony of certain of the witnesses reproduced in the exact words of the witnesses as is shown in the said statement, it is, by the court, directed that said testimony shall be reproduced;

It is, therefore, considered and ordered that said statement, which is hereto attached, be and the same is hereby approved.

RALPH E. CAMPBELL, Judge.

Endorsed: Filed Oct. 30, 1915. R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

21 And, to-wit, on the 8th day of May, A. D. 1915, the following proceedings were had in this cause. Honorable Ralph E. Campbell, Judge presiding.

in the United States District Court for the Eastern District of
Oklahoma.

No. 2017. Equity.

UNITED STATES OF AMERICA, Complainant,

v.

BESSIE WILDCAT et al., Defendants.

Decree.

On this the 8th day of May, 1915, at this term, this cause came on
further to be heard, and the evidence having been heard, the case hav-
ing been argued by counsel, thereupon, upon consideration thereof,
the court finds the issues against the complainant and in favor of the
defendants and interveners who answered to the complainant's bill
complaint as amended.

It is therefore, ordered, adjudged and decreed that the complain-
ant's bill of complaint as amended be, and the same is hereby, dis-
missed with prejudice against another action upon the same ground,
all of which the complainant excepts and its exception is allowed,
and in open court, and in the presence of counsel of record for the
defendants and interveners, the complainant gives notice of appeal.

RALPH E. CAMPBELL, Judge.

And, to-wit, on the 7th day of September, A. D. 1915, the following
proceedings were had in this cause. Honorable Ralph E. Campbell,
Judge presiding.

in the District Court of the United States for the Eastern District of
Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Complainant,

v.

BESSIE WILDCAT et al., Defendants.

Order Allowing Intervention of J. W. McNeal and L. W. Baxter.

Now on this 7th day of September, 1915, on hearing the motion of
J. W. McNeal and L. W. Baxter heretofore filed herein for leave to be
made parties to this cause and to file intervening petition herein,
the court, being advised in the premises, finds that the prayer of said
motion should be granted, on condition, however, that said interven-
ing petitioners accept all the terms of the decree entered in this cause,

after final hearing, on the 8th day of May, 1915, and agree to be bound and abide by any affirmance, modification or reversal of said decree as fully and completely and to the same effect as though they

122 had been parties to this cause when said trial was had, and had participated therein, to which condition said petitioners by their counsel in open court announce their consent.

It is, therefore, ordered that said motion for leave to file intervening petition herein be and it is hereby granted, and said intervening petition ordered filed, and said intervening petitioners made parties defendant in this action on condition, however, that said intervening petitioners accept all the terms of the decree entered in this cause on the 8th day of May, 1915, and shall be bound and abide by any affirmance, modification or reversal of said decree as fully and completely, and to the same effect, as though they had been parties to this cause when said trial was had and had participated therein.

RALPH E. CAMPELL, Judge.

And, to-wit, on the 7th day of September, A. D. 1915, the following proceedings were had in this cause. Honorable Ralph E. Campbell, Judge presiding.

In the District Court of the United States for the Eastern District of Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Complainant,

v.

BESSIE WILDCAT et al., Defendants.

Order Allowing Intervention of Dave Knight.

Now on this 7th day of September, 1915, on hearing the motion of Dave Knight heretofore filed herein for leave to be made a party to this cause and to file intervening petition herein, the court, being advised in the premises, finds that the prayer of said motion should — granted, on condition, however, that said intervening petitioner accept all the terms of the decree entered in this cause, after final hearing on the 8th day of May, 1915, and agrees to be bound and abide by any affirmance, modification or reversal of said decree as fully and completely and to the same effect as though he had been party to this cause when said trial was had, and had participated therein, to which condition said petitioner by his counsel in open court announce his consent.

It is, therefore, ordered that said motion for leave to file intervening petition herein be and it is hereby granted, and said intervening petitioner made party defendant in this action on condition, however, that said intervening petitioner accepts all the terms of the decree entered in this cause on the 8th day of May, 1915, and shall

bound and abide by any affirmance, modification or reversal of said decree as fully and completely, and to the same effect, as though he had been party to this cause when said trial was had and had participated therein.

RALPH E. CAMPBELL, *Judge.*

23 And, to-wit, on the 22nd day of September, A. D. 1915, the Complainant the United States of America filed Petition for Allowance of Appeal, together with Assignment of Errors, which appeal was allowed by the court. Said Petition for Allowance of Appeal, Order Allowing Appeal and Assignment of Errors are in words and figures as follows:

In the United States Court for the Eastern District of Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Complainant,

v.

BESSIE WILDCAT, a Minor; SANTA WATSON, as Guardian of Bessie Wildeat, a Minor; Cinda Lowe, Louisa Fife, Annie Wildeat, Emma West, Martha Jackson, a Minor; Saber Jackson, as Guardian and Next Friend of Martha Jackson, a Minor; J. Coody Johnson, Aggie Marshall, Phillip Marshall, H. B. Beeler, Max H. Cohn, Black Panther Oil & Gas Co., a Corporation; Jack Gouge, Ernest Gouge, Mattie Burner. Formerly Mattie Phillips; Jennie Phillips, Billie Phillips, D. L. Berryhill, William McCombs, Barney Unussee, Barnossee Unussee, Johnathan R. Posey, Charles F. Bissett, Taxaway Oil Company, a Corporation; F. L. Moore, J. S. Cosden, Fulhochee Barney, Siah Barney, Tommy Barney, Mollie Barney, Toney Chupko, Joseph Chupko, James C. Chupko, Eddie Larney, Polly Yargee, Sarkarye Chupko, Dick Larney, Moser Chupko, Tommy Chupko, Linda Harjo, Mary Jones, Loley Cooper, Celia Yahola, Charles S. Smith, Nora Watson, a Minor; John Smith, Lewis Smith, Lawrence Smith, Guy Smith, Ella Looney, nee Smith; Edna Pike, nee Smith; Pearlie Smith, Willis Smith, a Minor; J. S. Tilly, Guardian of Willis Smith, a Minor; Rannie Smith, Elizabeth Rhyne, nee Smith; Rashie C. Smith, Montie Nunn, nee Smith; Lou Smith, Howard Weber, Saber Jackson, Martha Simmons, Hannah Bullette, Robert Owen Burton, Nathaniel Mack Burton, Lydia Belle Wilson, nee Burton; Samuel L. Burton, Abi L. Miller, nee Burton; Minnie Ola Edwards, nee Burton; Mary Eliza Burton, J. W. McNeal, L. W. Baxter, Dave Knight, Defendants.

Petition for Appeal.

To the Honorable Ralph E. Campbell, District Judge:

The above named complainant feeling itself aggrieved by the decree made and entered in this cause on the 8th day of May, 1915,

does hereby appeal from said decree to the Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and it prays that its appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

D. H. LINEBAUGH,

United States Attorney;

W. P. Z. GERMAN,

Special Assistant to the United States Attorney.

The foregoing petition is granted and the appeal is this day allowed in open court.

Done this the 22d day of September, 1915.

RALPH E. CAMPBELL, *Judge.*

Endorsed: Filed Sep. 22, 1915. R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

In the United States Court for the Eastern District of Oklahoma

THE UNITED STATES OF AMERICA, Complainant,

v.

BESSIE WILDCAT, a Minor, et al., Defendants.

Assignment of Errors.

Comes now the complainant by D. H. Linebaugh, United States Attorney for the Eastern District of Oklahoma, and W. P. Z. German, Special Assistant to said United States Attorney, its solicitors of record, and shows that the final decree entered in the above entitled cause on the 8th day of May, 1915, is erroneous and unjust to complainant, and complainant now files the following assignment of errors, upon which it will rely in its appeal from said judgment and decree for a reversal of the same, to-wit:

I.

The court erred in overruling the motion of complainant to strike the joint answer, filed herein by the defendants and interveners.

II.

The court erred in rejecting certain evidence offered by complainant, to-wit: that portion of complainant's exhibit number 2, in which are shown the figures as follows:

125 "Stricken by order of Department, Dec. 13, 1906 (I. T. No. 22734-1906), Commissioner's File No. 55241-1906."

III.

The court erred in sustaining the objection of the defendants and interveners to the question propounded by the solicitors for complainant to the witness J. E. Kirkbride, as follows: "Q. Were there any improvements on the land?"

IV.

The court erred in rejecting the following evidence of the witness J. E. Kirkbride, offered by the complainant:

That on the 3rd day of November, 1913, the lands in controversy were unoccupied, unimproved and had not been occupied by fencing nor houses, nor had they been tilled or in any other manner occupied, nor in the physical possession of any person.

V.

The court erred in sustaining the motion of the defendants and interveners to strike the following answer of the witness W. H. Angell given in response to questions propounded by the solicitor for complainant, and in excluding said evidence, to-wit: "A. Yes, sir, and in red stricken from approved roll December 13, 1906, Commission file No. 55241, 1906."

VI.

The court erred in rejecting certain evidence offered by complainant, as follows: Complainant's Exhibit No. 7 consisting in a certified copy of the records in the office of the Commission to the Five Civilized Tribes pertaining to the cancellation of the enrollment of the name Barney Thlocco as a Creek citizen by blood, the full substance of said records being as follows:

A letter dated August 25, 1904, written by the Chairman of the Commission to the Five Civilized Tribes to the Secretary of the Interior, advising that the attorney for the Creek Nation had moved that the right of Barney Thlocco to enrollment be re-opened, and transmitting the affidavits of Wilson Knight and Barney Yahola relative to the date of death of said Barney Thlocco, and recommending that said case be re-opened on the ground that said Barney Thlocco died prior to April 1, 1899, and that a re-hearing be ordered;

126 A letter dated September 7, 1904, from the Commissioner of Indian Affairs to the Secretary of the Interior enclosing a report from the Commission to the Five Civilized Tribes dated August 25, 1904, concerning the application of the attorney for the Creek Nation to have said case re-opened, and recommending that said motion be granted;

The joint affidavit made August 9, 1904, of Wilson Knight and Barney Yahola, stating that they personally knew Barney Thlocco and that he died prior to April 1, 1899;

A letter dated September 16, 1904, from the Secretary of the Interior to the Commission to the Five Civilized Tribes, granting the said motion to re-hear said case, and so advising said Commission;

The testimony of Jonas Bear taken by and before the Commission to the Five Civilized Tribes on October 21, 1905, wherein he testifies, among other things, that Barney Thlocco died in January or February, 1899, and prior to the date upon which the Creek Land Office was opened, to-wit: April 1, 1899; and,

The testimony of Charley Simmer taken by and before the Commission to the Five Civilized Tribes on November 14, 1905, wherein he testified, among other things, that Barney Thlocco died in December 1898 or January 1899, and prior to the date upon which the Creek Land Office was opened, to-wit: April 1, 1899; the testimony of both said witnesses having been taken in the matter of the enrollment of Barney Thlocco, deceased, as a citizen by blood of the Creek Nation;

A notice dated February 9, 1906, addressed "To the heirs of Barney Thlocco, Arbeka, Indian Territory," signed by the Acting Commissioner to the Five Civilized Tribes, notifying said heirs that on February 19, 1906, a hearing would be conducted in the matter of the right of enrollment of Barney Thlocco, deceased;

A letter dated October 10, 1906, addressed to the Secretary of the Interior by the Commissioner to the Five Civilized Tribes, setting forth the various proceedings beginning with August 25th, 1904, had in connection with the re-hearing of the right of Barney Thlocco to enrollment, and the various hearings conducted by the Commission, and the substance of the evidence received, and advising that it

was conclusively established that Barney Thlocco died prior
127 to April 1, 1899, and recommending that authority be granted for striking his name from the approved roll of Creek citizens, opposite roll No. 8592, and transmitting the entire record in said matter: and,

A letter dated December 13, 1906, addressed to the Commissioner to the Five Civilized Tribes by the Secretary of the Interior, stating, among other things, that the recommendation to strike the name of Barney Thlocco from the approved roll was concurred in by both said office and the office of the Commissioner of Indian Affairs, and advising that said name had been cancelled by the Department from said roll, and that the Indian Office had been directed to take similar action, and authorizing said Commissioner to the Five Civilized Tribes to cancel said name from the roll in his custody.

VII.

The court erred in sustaining the objection of the defendants and interveners to the following question propounded by the solicitor for the complainant to the witness Hector Beaver, to-wit:

"Q. What year did he die in?"

VIII.

The court erred in rejecting the following evidence of the witness Hector Beaver, offered by the complainant:

We offer to prove by this witness that he knew Barney Thlocco. knew him for a number of years before his death. That the witness lived about a mile and a quarter northwest of the home of Barney Thlocco at the time of a small-pox epidemic in the Hilliby Indian settlement in the year 1899; that the witness remembers and testify as to when Lee Patrick, the United States Indian Agent of the Sac and Fox Agency, which agency had its head-quarters at six or eight miles northwest of the location of the Hilliby settlement, established a pest camp at or near the home of this witness, when a quarantine against the small-pox was established around Hilliby Settlement. And that prior to this time, which was in the latter part of January, 1899, Barney Thlocco died of small-pox. This witness we further offer to prove that he, the witness, visited the home of Barney Thlocco the night before the death of Barney Thlocco and at this time Thlocco was sick with the disease which the Indians thought was black measles. That several other Indians in the same locality were suffering from the same disease but neither the witness nor the Indians in the locality knew the affliction to be small-pox until the establishment of the pest camp by the Indian Agent in January, 1899. That the lumber used to build the coffin for Barney Thlocco was taken from an old house belonging to the witness, and witness saw Barney Thlocco's grave in the Indian cemetery about 200 yards from the house of Barney Thlocco. That the witness saw Barney Thlocco's coffin on the porch of the house of Barney Thlocco. The witness will testify that the taking of the coffin, and seeing of the same at the house of Barney Thlocco and observing the grave of Barney Thlocco was all before the establishment of the pest camp by Lee Patrick, the Indian Agent. The witness can and will further identify and fix the time by reason of the fact that several of the members of the witness' family died of this disease prior to the establishment of the pest camp and after the death of Barney Thlocco. That the witness will testify about the time the pest camp was established he visited the house of Barney Thlocco in company with one Jim Combest who was then engaged as a nurse for the Indian Agent in connection with the small-pox epidemic. That Combest took from this house on this occasion all the remaining members of the Thlocco family who were yet alive and all of them were suffering from small-pox, these people being taken to the pest camp. That at the time Thlocco was dead and buried. That about this time witness took Jim Combest to the home of Tuskegee Harjo who was suffering from the small-pox, and Combest took Tuskegee Harjo and the members of his family to the pest camp. Witness knows that Tuskegee Harjo attended the funeral of Barney Thlocco and that Tuskegee Harjo died on the same night of his removal to the pest camp."

IX.

The court erred in directing that the order of proof should be in a certain manner, which said direction is in words as follows, to-wit: "I hold that the order of proof in this case should first be with rela-

tion to the allegation as to the entire absence of evidence on the part of the Dawes Commission, before the Dawes Commission, as to Barney Thlocco being alive April 1, 1899."—and again in the following language: "Well, I hold, gentlemen, that the order of proof in this case shall be first with relation to the question as to lack of evidence before the Dawes Commission."

X.

The court erred in overruling the objection of the complainant to the question propounded by counsel for the defendants and
129 interveners to the witness Edward Merrick:

"Q. Do you know, without referring to any particular fact, that you never included any man's name in the schedule without taking evidence, did you?"—and in admitting the answer of the witness thereto:

"A. That is a fact that we had information that we thought we could rely on that that person was living on April 1, 1899."

XI.

The court erred in overruling the objection of the complainant to the following question propounded by the solicitor for the defendants and interveners to the witness P. B. Hopkins, to-wit:

"Q. There were parties out after that time and ultimately before any of these tentative enrollments were sent to the Secretary, the Commission became satisfied, on evidence, that the names of the parties whose names were transmitted to the Secretary of the Interior for approval were entitled to enrollment?"—and in admitting the answer of the witness thereto:

"A. Yes, sir."

XII.

The court erred in overruling the objection of the complainant to the following question propounded by the solicitor for the defendants and interveners to the witness P. B. Hopkins, to-wit:

"Q. Mr. Hopkins, what would you say as to whether or not the Commission arbitrarily enrolled any Creek citizen?" and in admitting the answer of the witness thereto:

"A. No, sir, it did not."

XIII.

The court erred in overruling the objection of the complainant to the following question propounded by the solicitor for the defendants and interveners to the witness John G. Leiber, to-wit:

"Q. Now could you tell me whether or not the clerk, in making up this last card got some additional information over and above what was on the first card?"—and in admitting the answer of the witness thereto: "Yes, he certainly must have."

XIV.

The court erred in overruling the objection of the complainant to the following question propounded by the solicitor for the defendants and interveners to the witness Tams Bixby:

"Q. Mr. Bixby, I will ask you whether that portion of the letter which you have just read was the character of statement you
130 generally made with reference to schedule of names when you sent them to Washington to the Secretary of the Interior?"—and in admitting the answer of the witness thereto:

"A. Yes, sir, that is the character."

XV.

The court erred in overruling the objection of the complainant to the following question propounded by the solicitor for the defendants and interveners to the witness Tams Bixby:

"Q. Now, assuming that that statement in there was the statement you generally make in writing these letters, will you now state to the court whether or not you returned a schedule of each and every name to the Secretary of the Interior?"—and in admitting the answer of the witness thereto:

"A. Yes, sir."

XVI.

The court erred in overruling the objection of the complainant to the following question propounded by the solicitor of the defendants and interveners to the witness Tams Bixby:

"Q. And when you returned that schedule, I will ask you if, as a matter of fact, you didn't advise the Department you had made a full and complete and perfect investigation of each and every case?"—and in admitting in evidence the answer of the witness thereto:

"A. Yes, sir."

XVII.

The court erred in overruling the objection of the complainant to the following question propounded by the solicitor for the defendants and interveners to the witness Tams Bixby:

"Q. Then if you did, Mr. Bixby, when you sent every schedule to the Department, state if that is what you stated that you had made a complete and perfect investigation of each and every case and did you mean that you had satisfied your Commission that each and every one of those men were entitled to enrollment?"—and in admitting in evidence the answer of the witness thereto:

"A. Yes, sir."

XVIII.

The court erred in overruling the objection of the complainant to the following question propounded by the solicitor for the defendants and interveners to the witness Tams Bixby:

"Q. Then as a matter of fact, Mr. Bixby, every name you sent in to the Department of the Interior as a name to be enrolled and which had been enrolled as a member of the Creek Tribe has been investigated by some member of your Commission at some place and by evidence outside of the rolls a determination had been reached that that person was entitled to enrollment, ain't that so?"—and in admitting in evidence the answer of the witness thereto:

"A. Yes, sir, that is my opinion, my view."

XIX.

The court erred in overruling the objection of the complainant to the introduction in evidence and in admitting in evidence a certified copy of a letter dated March 3, 1902, and addressed to the Honorable Secretary of the Interior, written by the Commission to the Five Civilized Tribes, pertaining to a schedule of names, among them the name Barney Thlocco, of citizens of the Creek Nation as enrolled by the said Commission upon the final roll of citizens of said nation, and therewith transmitted, and reciting, among other things, that said citizens were living on the 1st day of April, 1899, and that said Commission, after having thoroughly examined the rolls of the Creek Nation and such other evidence as had been submitted, touching the identification of the persons" on the roll therewith submitted, was of the opinion that "all are entitled to enrollment as Creek citizens by blood, and should be so enrolled."

XX.

The court erred in its finding of fact that the complainant failed to establish that there was no evidence before the Commission to the Five Civilized Tribes at the time it listed the name of Barney Thlocco for enrollment as a citizen by blood of the Creek Nation nor at any time prior to the preparation and forwarding by the Commission to the Five Civilized Tribes for approval by the Secretary of the Interior of the schedule upon which said name was placed by the said Commission.

XXI.

The court erred in sustaining the objection of the defendants and interveners to the following question propounded by the solicitor for the complainant to the witness Hector Beaver, to-wit:

"Q. Mr. Beaver, how far is your house to where Thlocco——"

XXII.

The court erred in rejecting the following evidence which complainant offered to prove by the witness Hector Beaver and by the following other witnesses, to-wit: Figey Blueford, Ben Combest, Jim

132 Combest, A. B. Comer, W. A. Christie, Martin Daugherty, Dan Dirt, J. J. Evans, Ben Hoter, Billy Johnson, Charlie Swift, Milannie, Thomas Vanderslice, Pete Washington, and

other witnesses produced by the complainant, and by records and documentary evidence:

"That Barney Thlocco in whose name the patent was made in this case died on or about the 10th day of January, 1899, at age of from forty-five to fifty years and prior to the 26th day of January, 1899; that Barney Thlocco was a resident of the Creek Indian settlement known as Hilliby where he had resided a number of years prior to his death; that said settlement is situated in what is known as Tuckabachie Town of the Creek Tribe of Indians and of which Barney Thlocco was a member. That during the winter of 1898 and 1899 the small-pox broke out in the Hilliby settlement, which disease at that time was supposed and believed by the Indians to be black measles and was so believed by them to be black measles until the 26th day of January, 1899. That on the 26th day of January, 1899, Lee Patrick, the then Indian Agent of the Sac and Fox Agency near the Hilliby Settlement was directed by the Secretary of the Interior to take steps to eradicate this disease among the Indians; that Mr. Patrick made inquiry and found the disease to be small-pox and established a pest camp in the settlement to which all the Indians affected with small-pox were removed; that the establishment of this pest camp was on the 26th day of January, 1899; that this pest camp was maintained until the eradication of the disease among the Indians in the spring of 1899; that Barney Thlocco died about two weeks before the establishment of this pest camp; that he was either the first or second Indian to die of this disease; that the first Indian to become afflicted therewith was Figey Blueford; that Barney Thlocco was a prominent Indian, that it was widely, generally and well known among all the inhabitants of this community that he died before the establishment of the pest camp on the date aforesaid; that a large number, approximately seventy-five of the Indians in the community died of the disease during the prevalence of this epidemic; that the official record of the small-pox camp kept by the Indian Agent Patrick will and does show that only one of such Indians died after April 1, 1899; that the name of this Indian who died after April 1, 1899, was O-ar-heneka; that the Indian Agent Patrick, who was then the Indian Agent at the Sac and Fox Agency, was an employee and representative of the Department of the Interior of the United States. That the following named Indians,

to-wit: Tuskegee Harjo, Arch Johnson, Jimmie Deer, and
133 Sam Laslie attended the burial of Barney Thlocco, one of them having made his coffin and others of them having dug his grave, and buried him; and that these same persons afterwards were taken with the small-pox and removed to the camp and that all of them except Tuskegee Harjo died during the month of February, 1899, and that Tuskegee Harjo died January 27th, 1899; that all of the members of the Barney Thlocco family consisting of himself and three children died of the epidemic about that time except Thlocco himself in the pest camp established in Hilliby shortly after the establishment thereof and during the month of February, 1899, Thlocco himself having died at the time aforesaid; that Barney Thlocco's only living brother died during this epidemic in the month

of February, 1899, after having been present at the death of Barney Thlocco and at the burial of Barney Thlocco. That this was the only small-pox epidemic that ever occurred in the Hilliby Settlement and that the epidemic left very few survivors in the settlement."

XXIII.

The court erred in rejecting the following evidence offered by complainant: That portion of the separate answer of the defendant, the Black Panther Oil & Gas Company, filed October 28, 1914, in words as follows:

"This defendant admits that there was no controversy or contest of any kind put on before said Commission with respect to the enrollment of said Barney Thlocco or his right to be so enrolled, and in this connection this defendant avers that there was no ground for any controversy or contesting the right of said Barney Thlocco to receive an allotment, his enrollment not having been challenged in any manner."

XXIV.

The court erred in not permitting the complainant to prove that there was no instrument filed in the office of the Register of Deeds of Creek County, Oklahoma, until the year 1913 which in any manner affected the title to the lands in controversy.

XXV.

The court erred in not permitting the complainant to prove that a suit was instituted by the United States of America against the unknown heirs of Barney Thlocco in the United States Circuit

134 Court for the Eastern District of Oklahoma on February 17, 1911, said suit being No. 1543, and that a decree was entered in said case on July 29, 1911, cancelling the patents to the lands in controversy issued to and in the name of Barney Thlocco.

XXVI.

The court erred in not permitting the complainant to prove by the witness W. H. Angell, from the records of the Superintendent for the Five Civilized Tribes, formerly the United States Indian Superintendent, formerly the Commission to the Five Civilized Tribes, that on July 20, 1913, there appeared before the Commissioner to the Five Civilized Tribes, certain persons, to-wit: M. L. Mott, National Attorney for the Creek Nation, and D. H. Bynum, representing the Creek Nation, and J. Coody Johnson of Wewoka, Oklahoma, and George M. Swift of Wewoka, Oklahoma, both representing the heirs of Barney Thlocco, deceased, at which time and place proceedings were had and testimony taken before the said Superintendent to obtain a restoration of the name Barney Thlocco to the rolls of Creek Indians, from which his name had been stricken on December 13, 1906, by

the Secretary of the Interior, at which time the testimony of a number of witnesses was taken in relation to said application.

XXVII.

The court erred in rejecting the following evidence offered by complainant: That portion of complainant's Exhibit No. 1 in the words and figures as follows:

"No. 1, stricken from approved roll by authority of Department Dec. 13, 1906."

and to prove in connection with the introduction thereof that that entry was made on said exhibit before March 4, 1907, and immediately after the receipt of the letter of the Secretary of the Interior directing the Commission to cancel the enrollment of said name Barney Thlocco, which said letter forms and composes a part of the complainant's Exhibit No. 7.

XXVIII.

The court erred in rejecting the following evidence offered by complainant: That portion of complainant's Exhibit No. 2, in words and figures as follows:

"Stricken by order of the Department, December 13, 1906."

and in not permitting the complainant to show that the above 35 quoted portion of said Exhibit No. 2 was placed on the official roll of citizens by blood of the Creek Nation opposite the name Barney Thlocco pursuant to the letter of the Department of the Interior dated December 13, 1906, and immediately after the receipt of said letter by the Commission and prior to the 4th day of March, 1907.

XXIX.

The court erred in its order ruling and directing that before the complainant would be permitted to introduce evidence in support of the averment contained in the bill of complaint as amended to the effect that Barney Thlocco died prior to April 1, 1899, it would be necessary for complainant to establish by evidence to the satisfaction of the court that the Commission to the Five Civilized Tribes in enrolling the name "Barney Thlocco" was a citizen by blood of the Creek Nation opposite roll No. 8592 upon the final roll of citizens by blood of said nation, acted arbitrarily, and without any evidence, information, knowledge or belief as to whether or not the said Barney Thlocco was living or dead on the 1st day of April, 1899.

XXX.

The court erred in not permitting the complainant to introduce evidence in support of its allegation that Barney Thlocco died prior to the 1st day of April, 1899, regardless of the question as to whether

or not the Commission to the Five Civilized Tribes in enrolling the name of Barney Thlocco with the approval of the Secretary of the Interior, acted arbitrarily, and without any evidence, knowledge, information or belief as to whether or not he was living or dead on the 1st day of April, 1899.

XXXI.

The court erred in ruling, holding and deciding that before the complainant was entitled to the relief prayed for, it must be proved that the enrollment of Barney Thlocco by the Commission to the Five Civilized Tribes was arbitrarily made.

XXXII.

The court erred in not finding, holding, ruling and deciding that the Commission to the Five Civilized Tribes enrolled Barney Thlocco without authority of law for the reason that the evidence introduced and the further evidence offered by the complainant shows
136 that Barney Thlocco was not living on April 1, 1899, and it was an essential prerequisite to his enrollment that he be alive on that date.

XXXIII.

The court erred in not finding, ruling, holding and deciding that the allotment of the lands involved in this controversy was not an allotment made and selected within the meaning of the Act of Congress approved March 1, 1901 (31 Stat. L. 861), for the reason that such allotment was arbitrarily made by the Commission to the Five Civilized Tribes to a person who was then dead and for whom no application for allotment had been made by any person whatever and the allotment certificate and patents were attempted to be issued to and were in the name of said deceased person.

XXXIV.

The court erred in ruling, holding and deciding that the Secretary of the Interior had no power or authority to cancel the enrollment of Barney Thlocco on the ground that title to the land embraced in such pretended allotment selection had passed out of the Creek Nation by the exception, approval and recordation of patents therefor, but which said patents had not been delivered to any person, but were, as they had been since their execution, in the possession of the Government.

XXXV.

The court erred in holding, ruling and deciding that after the passage of the Act of Congress, approved April 26, 1906 (34 Stat. L. 137), and under the provisions thereof, the Secretary of the Interior had no power or authority to cancel the enrollment of Barney Thlocco.

XXXVI.

The court erred in holding, ruling and deciding that the placing of the name of Barney Thlocco on the final roll of citizens of the Creek Nation was an adjudication of his right to be so enrolled, and that said enrollment had all the force and effect of a judgment and a judicial determination of his right to be enrolled, and in holding, ruling and deciding that such judgment could not be attacked by the complainant by proof that Barney Thlocco was not in fact living on April 1, 1899, and by proof that the Commission to the Five Civilized Tribes and the Secretary of the Interior had so found and determined as a result of proceedings instituted subsequent to his enrollment.

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XXXVII.

The court erred in not finding, ruling, holding and deciding that the acts of the Commission to the Five Civilized Tribes and the Secretary of the Interior in the institution of proceedings to determine the date of the death of Barney Thlocco, the finding by said Commission and the said Secretary of the Interior, as a result of such proceedings, that he died prior to April 1st, 1899, and the cancellation of his enrollment by the said Secretary on such ground, were in fact and in effect, a reversal of the purported judgment enrolling said Barney Thlocco before the rights of any third person in the lands involved in this controversy had attached, and before any right, title or interest had vested in any such person in and to said lands.

XXXVIII.

The court erred in sustaining the motion of the defendants and interveners for the dismissal of the Government's bill of complaint as amended and the entry of a decree in favor of the defendants and interveners.

XXXIX.

The court erred in finding the issues against the complainant and in favor of the defendants and interveners.

XL.

The court erred in ordering, adjudging and decreeing that the complainant's bill of complaint, as amended, be dismissed, and in dismissing the same.

XLI.

The court erred in ordering, adjudging and decreeing that the complainant's bill of complaint, as amended, be dismissed with prejudice against another action on the same ground, and in so dismissing the same.

XLII.

The court erred in not ordering, adjudging and decreeing that the complainant do have the relief prayed for in its bill of complaint as amended.

Wherefore the complainant prays that the said decree be reversed and the District Court be instructed to enter a decree in accordance with the prayer of the amended bill of complaint, or that the United

States Circuit Court of Appeals for the Eighth Circuit shall
138 reverse said decree and on the record render a decree as prayed

for by complainant's said bill of complaint as amended, or if neither of these be deemed just and equitable that the said decree be reversed and a rehearing and retrial of said action by the District Court be ordered, and for all other proper relief.

D. H. LINEBAUGH,

United States Attorney;

W. P. Z. GERMAN,

Special Assistant United States Attorney,

Solicitors for Complainant.

Endorsed: Filed Sep. 22, 1915. R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

COPY BOUND C

In the United States Court for the Eastern District of Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

vs.

BESSIE WILDCAT et al., Appellees.

Citation.

The United States of America to Bessie Wildcat, a minor; Santa Watson, as guardian of Bessie Wildcat, a minor; Cinda Lowe, Louisa Fife, Annie Wildcat, Emma West, Martha Jackson, a minor; Saber Jackson, as guardian and next friend of Martha Jackson, a minor; J. Coody Johnson, Aggie Marshall, Phillip Marshall, H. B. Beeler, Max H. Cohn, Black Panther Oil & Gas Company, a corporation; Jack Gouge, Ernest Gouge, Mattie Bruner, formerly Mattie Phillips; Jennie Phillips, Billie Phillips, D. L. Berryhill, William McCombs, Barney Unussee, Baronssee Unussee, Johnathan R. Posey, Charles F. Bissett, Taxaway Oil Company, a corporation; F. L. Moore, J. S. Cosden, Fulhohchee Barney, Siah Barney, Tommy Barney, Mollie Barney, Toney Chupko, Joseph Chupko, James C. Chupko, Eddie Larney, Polly Yargee, Sarkarye Chupko, Dick Larney, Moser Chupko, Tommy Chupko, Linda Harjo, Mary Jones, Loley Cooper, Celia Yahola, Charles S. Smith, Nora Watson, a minor; John Smith, Lewis Smith, Lawrence Smith, Guy Smith, Ella Looney, nee Smith; Edna Pike, nee Smith; Pearlle Smith, Willie Smith, a minor; J. S. Tilly, guardian of Willie Smith, a minor; Rannie Smith, Elizabeth Rhyne, nee Smith; Rashie C. Smith, Montie Nunn, nee Smith; 139 Lou Smith, Howard Weber, Saber Jackson, Martha Simmons, Hannah Bullette, Robert Owen Burton, Nathaniel Mack Burton, Lydia Belle Wilson, nee Burton; Samuel L. Burton, Abi L. Miller, nee Burton; Minnie Ola Edwards, nee Burton; Mary Eliza Burton, J. W. McNeal, L. W. Baxter, and Dave Knight. Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal filed in the office of the clerk of the United States District Court for the Eastern District of Oklahoma, wherein the United States of America is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant, and which is appealed from as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Ralph E. Campbell, Judge of the United

States District Court for the Eastern District of Oklahoma, this 22nd day of September, 1915.

RALPH E. CAMPBELL,

United States Judge for the Eastern District of Oklahoma

Service of the foregoing citation is acknowledged by the undersigned defendants and appellees by their solicitors of record on the dates indicated beside their respective names:

Oct. 15th, 1915.

GEO. S. RAMSEY,

EDGAR A. DE MEULES,

Solicitors for Bessie Wildcat, a Minor; Santa Watson, as Guardian and Guardian ad Litem for Bessie Wildcat, a Minor; Cinda Lowe, Louisa Fife, Annie Wildcat, and Emma West.

Oct. 15th, 1915.

RALPH P. WELCH AND

FRANKLIN & CAREY,

Solicitors for Aggie Marshall, Phillip Marshall, Celia Yakola, Toney Chupko, Joseph Chupko, James C. Chupko, Eddie Larney, Polly Yargee, Sarkarye Chupko, Dick Larney, Moser Chupko, Tommy Chupko, Linda Harjo, Mary Jones, and Loley Cooper.

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Oct. 15, 1915.

MALCOLM E. ROSSER,

Solicitors for H. B. Beeler.

Oct. 15, 1915.

J. B. FURRY,

E. C. MOTTER,

Solicitors for D. L. Berryhill, Charles S. Smith, Nora Watson, a Minor; John Smith, Lewis Smith, Laurence Smith, Guy Smith, Ella Looney, nee Smith; Edna Pike, nee Smith; Pearle Smith, Willis Smith, a Minor; J. S. Tilly, Guardian of Willis Smith, a Minor; Rannie Smith, Elizabeth Rhyne, nee Smith; Rashie C. Smith, Montie Nunn, nee Smith, and Lon Smith.

Oct. 15, 1915.

TURNER & TURNER,

OWEN & STONE,

Solicitors for Barney Unussee, or Barnosse Unussee; Fulhohchee Barney, Siah Barney, Tommy Barney, Mollie Barney.

Oct. 16, 1915.

F. SCRUGGS,

Solicitor for Johnathan R. Posey

Oct. 16, 1915.

BAILEY & WYAND,
*Solicitors for Robert Owen Burton, Nathaniel
Mack Burton, Lydia Belle Wilson, nee
Burton; Samuel L. Burton, Abi L. Miller,
nee Burton; Minnie Ola Edwards, nee Bur-
ton, and Mary Eliza Burton.*

October 15, 1915.

HORACE SPEED,
Solicitor for J. W. McNeal and L. W. Baxter.

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(Copy.)

In the United States Court for the Eastern District of Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT et al., Appellees.

Citation.

The United States of America to Bessie Wildcat, a minor, Santa Watson, as guardian of Bessie Wildcat, a minor, Cinda Lowe, Louisa Fife, Annie Wildcat, Emma West, Martha Jackson, a minor, Saber Jackson, as guardian and next friend of Martha Jackson, a minor, J. Coody Johnson, Aggie Marshall, Phillip Marshall, H. B. Beeler, Max H. Cohn, Black Panther Oil & Gas Company, a corporation, Jack Gouge, Ernest Gouge, Mattie Bruner, formerly Mattie Phillips, Jennie Phillips, Billie Phillips, D. L. Berryhill, William McCombs, Barney Unussee, Barnossee Unussee, Johnathan R. Posey, Charles F. Bissett, Taxaway Oil Company, a corporation, F. L. Moore, J. S. Cosden, Fulhobchee Barney, Siah Barney, Tommy Barney, Mollie Barney, Toney Chupko, Joseph Chupko, James C. Chupko, Eddie Larney, Polly Yargee, Sarkarye Chupko, Dick Larney, Moser Chupko, Tommy Chupko, Linda Harjo, Mary Jones, Loley Cooper, Celia Yahola, Charles S. Smith, Nora Watson, a minor, John Smith, Lewis Smith, Lawrence Smith, Guy Smith, Ella Looney, nee Smith, Edna Pike, nee Smith, Pearlie Smith, Willis Smith, a minor, J. S. Tilly, guardian of Willis Smith, a minor, Rannie Smith, Elizabeth Rhyne, nee Smith, Rashie C. Smith, Montie Dunn, nee Smith, Lou Smith, Howard Weber, Saber Jackson, Martha Simmons, Hannah Bullette, Robert Owen Burton, Nathaniel Mack Burton, Lydia Belle Wilson, nee Burton, Samuel L. Burton, Abi L. Miller, nee Burton, Minnie Ola Edwards, nee Burton, Mary Eliza Burton, J. W. McNeal, L. W. Baxter, and Dave Knight.

Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the

City of St. Louis, Missouri, sixty days from and after the day the citation bears date, pursuant to an appeal filed in the office of the clerk of the United States District Court for the Eastern District of Oklahoma, wherein the United States of America is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant, and which is appealed from as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Ralph E. Campbell, Judge of the
142 United States District Court for the Eastern District of Oklahoma, this 22nd day of September, 1915.

RALPH E. CAMPBELL,
*United States Judge for the Eastern
District of Oklahoma.*

Service of the foregoing citation is acknowledged by the undersigned defendants and appellees by their solicitors of record on the dates indicated beside their respective names. This Oct. 14th, 1915.

MAX H. COHN,
By His Solicitors, LEDBETTER, STUART & BELL

(Copy.)

In the United States Court for the Eastern District of Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT et al., Appellees.

Citation.

The United States of America to Bessie Wildcat, a minor, Santa Watson, as guardian of Bessie Wildcat, a minor, Cinda Lowe, Louisa Fife, Annie Wildcat, Emma West, Martha Jackson, a minor, Saber Jackson, as guardian and next friend of Martha Jackson, a minor, J. Coody Johnson, Aggie Marshall, Phillip Marshall, H. B. Beeler, Max H. Cohn, Black Panther Oil & Gas Company, a corporation, Jack Gouge, Ernest Gouge, Mattie Bruner, formerly Mattie Phillips, Jennie Phillips, Billie Phillips, D. L. Berryhill, William McCombs, Barney Unussee, Barnessee Unussee, Johnathan R. Posey, Charles F. Bissett, Taxaway Oil Company, a corporation, F. L. Moore, J. S. Cosden, Fulhochee Barney, Siah Barney, Tommy Barney, Mollie Barney, Toney Chupko, Joseph Chupko, James C. Chupko, Eddie Larney, Polly Yargee, Sarkarye Chupko, Dick Larney, Moser Chupko, Tommy Chupko, Linda Harjo, Mary Jones, Loley Cooper, Celia Yahola, Charles S. Smith, Nora Watson, a minor, John Smith, Lewis Smith, Lawrence Smith, Guy Smith, Ella Looney, née Smith, Edna Pike, née Smith, Pearle Smith, Willis Smith, a minor, J. S. Tilly, guardian of Willis Smith, a minor, Rannie Smith, Elizabeth Rhyne, née Smith, Rashie C. Smith, Montie Dunn, née Smith, Lou Smith, Howard Weber, Saber Jackson, Martha Simmons, Hannah Bullette, Robert Owen Burton, Nathaniel Mack Burton, Lydia Belle Wilson, née Burton, Samuel L. Burton, Abi L. Miller, née Burton, Minnie Ola Edwards, née Burton, Mary Eliza Burton, J. W. McNeal, L. W. Baxter, and Dave Knight, Greeting:

143 You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, Sixty days from and after the day this citation bears date, pursuant to an appeal filed in the office of the clerk of the United States District Court for the Eastern District of Oklahoma, wherein the United States of America is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant, and which is appealed from as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Ralph E. Campbell, Judge of the United States District Court for the Eastern District of Oklahoma, this 22nd day of September, 1915.

RALPH E. CAMPBELL,
*United States Judge for the Eastern
District of Oklahoma.*

Service of the foregoing citation is acknowledged by the undersigned defendants and appellees by their solicitors of record on the dates indicated beside their respective names:

ROWLAND, TALBOTT & NYCE,
Att'ys for Dave Knight.

10/16/15.

In the District Court of the United States for the Western District of Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT et al., Appellees.

Service of the Citation in the above entitled cause is hereby acknowledged this 15th day of October, 1915.

STUART, CRUCE & CRUCE,
*Attorneys for Defendant, Black Panther
Oil and Gas Co.*

In the United States Court for the Eastern District of Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT et al., Appellees.

Acknowledgment of Service of Citation.

Service of the citation issued on the 22nd day of September, 1915, by the Honorable Ralph E. Campbell, United States Judge for the Eastern District of Oklahoma, citing appellees in the above entitled action to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, sixty days from and after the day said citation bears date, pursuant

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to an appeal filed and allowed in said action, is acknowledged to have been made upon the undersigned appellees on this the 15th day of October, 1915.

HOWARD WEBER,
By J. J. SHEA,
BURDETTE BLUE,
His Solicitors.

In the United States Court for the Eastern District of Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT et al., Appellees.

Acknowledgment of Service of Citation.

Service of the citation issued on the 22nd day of September, 1915, by the Honorable Ralph E. Campbell, United States Judge for the Eastern District of Oklahoma, citing appellees in the above entitled action to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, sixty days from and after the day said citation bears date, pursuant to an appeal filed and allowed in said action, is acknowledged to have been made upon the undersigned appellees on this the 15th day of October, 1915.

SABER JACKSON,
By JOHN DEVEREUX,
His Solicitor.

In the United States Court for the Eastern District of Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT et al., Appellees.

Acknowledgment of Service of Citation.

Service of the citation issued on the 22nd day of September, 1915, by the Honorable Ralph E. Campbell, United States Judge for the Eastern District of Oklahoma, citing appellees in the above entitled action to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, sixty

days from and after the day said citation bears date, pursuant to an appeal filed and allowed in said action, is acknowledged to have been made upon the undersigned appellees on this the 15th day of October, 1915.

JACK GOUGE,
ERNEST GOUGE,
MATTIE BURNER,
Formerly Mattie Phillips;
JENNIE PHILLIPS,
BILLIE PHILLIPS,
D. L. BERRYHILL, AND
WILLIAM McCOMBS,
By HASKELL B. TALLEY,
Their Solicitor.

145 In the United States Court for the Eastern District of
Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT et al., Appellees.

Acknowledgment of Service of Citation.

Service of the citation issued on the 22nd day of September, 1915, by the Honorable Ralph E. Campbell, United States Judge for the Eastern District of Oklahoma, citing appellees in the above entitled action to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, sixty days from and after the day said citation bears date, pursuant to an appeal filed and allowed in said action, is acknowledged to have been made upon the undersigned appellees on this the 15th day of October, 1915.

CHARLES F. BISSETT,
TAXAWAY OIL COMPANY,
A Corporation;
F. L. MOORE AND
J. S. COSDEN,
By SHERMAN, VEASEY & DAVIDSON,
Their Solicitors.

In the United States Court for the Eastern District of Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT et al., Appellees.

Acknowledgment of Service of Citation.

Service of the citation issued on the 22nd day of September, 1915, by the Honorable Ralph E. Campbell, United States Judge for the Eastern District of Oklahoma, citing appellees in the above entitled action to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, sixty days from and after the day said citation bears date, pursuant to an appeal filed and allowed in said action, is acknowledged to have been made upon the undersigned appellees on this the 15th day of October, 1915.

MARTHA JACKSON,

A Minor;

SABER JACKSON,

*As Guardian and Guardian ad Litem and Next Friend
of Martha Jackson, a Minor, and*

J. COODY JOHNSON,

By J. COODY JOHNSON,

Their Solicitors.

In the United States Court for the Eastern District of Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT et al., Appellees.

Acknowledgment of Service of Citation.

Service of the citation issued on the 22nd day of September, 1915, by the Honorable Ralph E. Campbell, United States Judge for the Eastern District of Oklahoma, citing appellees in the above entitled action to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, sixty days from and after the day said citation bears date, pursuant to an appeal filed and allowed in said action, is acknowledged to have been

made upon the undersigned appellees on this the 15th day of October, 1915.

MARTHA SIMMONS AND
HANNAH BULLETTE,
WM. A. COLLIER,
Their Solicitors

In the United States Court for the Eastern District of Oklahoma

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT et al., Appellees.

Acknowledgment of Service of Citation.

Service of the citation issued on the 22nd day of September, 1915, by the Honorable Ralph E. Campbell, United States Judge for the Eastern District of Oklahoma, citing appellees in the above entitled action to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, six days from and after the day said citation bears date, pursuant to appeal filed and allowed in said action, is acknowledged to have been made upon the undersigned appellees on this the 15th day of October, 1915.

JACK GOUGE,
ERNEST GOUGE,
MATTIE BRUNER,
Formerly Mattie Phillips;
JENNIE PHILLIPS,
BILLIE PHILLIPS AND
WILLIAM McCOMBS,
By E. J. VAN COURT &
HAZEN GREEN,
Their Solicitors

In the United States Court for the Eastern District of Oklahoma

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT et al., Appellees.

Acknowledgment of Service of Citation.

Service of the citation issued on the 22nd day of September, 1915, by the Honorable Ralph E. Campbell, United States Judge for the Eastern District of Oklahoma, citing appellees in the above entitled action to be and appear in the United States

Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, sixty days from and after the day said citation bears date, pursuant to an appeal filed and allowed in said action, is acknowledged to have been made upon the undersigned appellees on this the 29th day of October, 1915.

M. M. TRAVIS,
Administrator of the Estate of
Max H. Cohn, Deceased,
By BELL & FELLOWS,
His Solicitors.

In the United States District Court for the Eastern District of Oklahoma.

No. 2017. E. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, Minor, et al., Appellees.

Acknowledgment of Service.

Service of the citation issued in the above entitled cause, dated September 22, 1915, is hereby acknowledged.

Dated November 10th, 1915.

W. A. LEDBETTER,
Solicitor for Anna Messenger,
Yetta Cohn and Isadore Cohn.

In the United States District Court for the Eastern District of Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the præcipe of appellant, indicating the portions of the record to be incorporated in the transcript on appeal in said cause is hereby acknowledged, and failure to make such service prior to the date of filing said præcipe is hereby waived. Dated November 10th, 1915.

W. A. LEDBETTER,
Solicitor for Anna Messenger,
Yetta Cohn and Isadore Cohn.

And, to-wit, on the 30th day of October, A. D. 1915, the following proceedings were had in this cause. Honorable Ralph E. Campbell, Judge presiding.

In the United States Court for the Eastern District of Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT et al., Appellees.

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Order of Revivor.

Now on this the 30th day of October, 1915, the above entitled and numbered cause came on to be heard upon the suggestion of the death of the defendant and appellee, Max H. Cohn, and the voluntary appearance of M. M. Travis, administrator of his estate, filed herein on this day, and it appearing to the court that said Max H. Cohn departed this life on the 21st day of September, 1915, and that he left surviving him as his heirs his brothers and sisters residing without the jurisdiction of this court and in the States of Virginia and North Carolina, and that on the first day of October, 1915, M. M. Travis was appointed administrator of the estate of said deceased by the County Court of Tulsa County, Oklahoma, within the jurisdiction of this court;

It is considered, ordered, adjudged and decreed that this cause be revived in this court in the name of said administrator, and that he, said administrator, be substituted as a party defendant and appellee in lieu of the said Max H. Cohn, deceased.

RALPH E. CAMPBELL, Judge.

In the United States District Court for the Eastern District of Oklahoma.

No. 2017. E.

THE UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Præcipe for Transcript.

To the Clerk of the above-named Court:

You will please incorporate into the transcript of record on the appeal taken by the complainant, the United States of America, in

the case of the United States of America, complainant, v. Bessie Wildcat, a minor, et al., defendants, No. 2017-E, the following portions of the record, to-wit:

1. The amended bill of complaint filed July 15, 1914.
2. The order of the court entered September 22, 1915, as of August 1914, granting leave to Charles F. Bissett, et al., to intervene and making them parties defendant.
3. The order of the court dated October 23, 1914, permitting Fulchree Barney, et al., to intervene and making them parties defendant.
4. The order of the court dated September 22, 1915, as of October 1914, permitting Howard Weber to intervene and making him party defendant.
5. The amended intervening petition of Charles F. Bissett, et al., filed November 2, 1914.
6. The order of the court dated September 22, 1915, made as of November 4, 1914, granting leave to Johnathan R. Posey to intervene and making him a party defendant.
7. The answer and cross-petition of Johnathan R. Posey filed November 4, 1914.
8. The order of the court dated November 4, 1914, granting leave to Toney Chupko, et al., to intervene and making them parties defendant.
9. The order of the court dated November 4, 1914, granting leave to Charles S. Smith, et al., to intervene and making them parties defendant.
10. The order of the court dated November 4, 1914, appointing Lanta Watson as guardian ad litem for the defendant, Bessie Wildcat, a minor.
11. The order of the court dated November 5, 1914, appointing Saber Jackson as guardian ad litem for the defendant, Martha Jackson, a minor.
12. The order of the court dated November 13, 1914, appointing F. Brett as guardian ad litem for the defendants, Nora Watson, minor, and Willis Smith, a minor.
13. The order of the court dated November 23, 1914, granting leave to Saber Jackson to intervene and making him a party defendant.
14. The order of the court made and entered September 9, 1915, as of November 23, 1914, granting leave to Martha Simmons, et al., to intervene and making them parties defendant.
15. The order of the court dated September 22, 1915, entered as of May 4, 1915, granting leave to Robert Owen Burton, et al., to intervene and making them parties defendant.
16. The joint answer of the defendants and interveners, Bessie Wildcat, et al., filed May 4, 1915.
17. The motion of the complainant to strike the joint answer of the defendants and interveners, Bessie Wildcat, et al., filed May 4, 1915.
18. The order of the court made and entered on May 4, 1915,

overruling the motion of the complainant to strike the joint answer of the defendants and interveners, Bessie Wildeat, et al.

150 19. The order of the court made and entered — —, 1915, setting said cause for trial.

20. The order of the court made and entered on May 3, 1915, continuing said cause to May 4, 1915, for trial.

21. The order of the court made and entered on May 4, 1915, continuing said cause to May 5, 1915.

22. The statement of the evidence admitted and that offered and rejected, at the final hearing of said action, the objections of counsel, the rulings of the court thereon, all exceptions, the opinions of the court announced at the said final hearing, motions made at said final hearing, the objections thereto, the action of the court thereon and exceptions saved, and all the proceedings had and conducted at said final hearing, as contained in approved statement thereof.

23. The final decree of the court made and entered on May 8, 1915.

24. The order of the court made and entered on September 7, 1915, granting leave to J. W. McNeal, et al., to intervene and making them parties defendant.

25. The order of the court made and entered on September 7, 1915, granting leave to Dave Knight to intervene and making him a party defendant.

26. The petition for appeal and order allowing appeal.

27. The assignment of errors.

28. This præcipe for transcript.

29. Citation and acceptance of service.

And appellant further requests that the said record be printed under the provisions of the act of Congress entitled "An act to diminish the expense of proceedings on appeal and writ of error, or of certiorari" (approved February 13, 1911) and that same be filed in the office of the clerk of the Circuit Court of Appeals for the Eighth Circuit at St. Louis on or before sixty days from and after September 22, 1915.

D. H. LINEBAUGH,
United States Attorney;

W. P. Z. GERMAN,
*Special Assistant to the United States Attorney,
Solicitors for Appellant.*

151 In the United States District Court for the Eastern District
of Oklahoma.

No. 2017-E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the præcipe of appellant indicating the portions of the record to be incorporated in the transcript on the appeal in said cause is hereby acknowledged.

Dated October 15, 1915.

BARNEY UNUSSEE OR
BARNOSSEE UNUNOSSEE,
FULHOHCHEE BARNEY,
SIAH BARNEY,
TOMMY BARNEY, AND
MOLLIE BARNEY,
By TURNER & TURNER,
OWEN & STONE,
Their Solicitors.

Dated October 16, 1915.

JOHNATHAN R. POSEY,
By F. SCRUGGS, *His Solicitor.*

Dated October 16, 1915.

ROBERT OWEN BURTON,
NATHANIEL MACK BURTON,
LYDIA BELLE WILSON, *Née*
BURTON,
SAMUEL L. BURTON,
MINNIE OLA EDWARDS, *Née*
BURTON,
ABI L. MILLER, *Née* BURTON,
AND
MARY ELIZA BURTON,
By BAILEY & WYAND,
Their Solicitors.

Dated October 15, 1915.

BESSIE WILDCAT, A MINOR;
SANTA WATSON,
As Guardian ad litem for
Bessie Wildcat, a Minor;

CINDA LOWE,
 LOUISA FIFE,
 ANNIE WILDCAT, AND
 EMMA WEST,
 By GEO. S. RAMSEY,
 EDGAR A. DE MEULES,
Their Solicitors.

Dated October 15th, 1915.

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AGGIE MARSHALL,
 PHILLIP MARSHALL,
 CELIA YAHOLA,
 TONCY CHUPKO,
 JOSEPH CHUPKO,
 JAMES C. CHUPKO,
 EDDIE LARNEY,
 POLLY YARGEE,
 SARKARYE CHUPKO,
 DICK LARNEY,
 MOSER CHUPKO,
 TOMMY CHUPKO,
 LINDA HARJO,
 MARY JONES, AND
 LOLEY COOPER,
 By RALPH P. WELCH AND
 FRANKLIN & CAREY,
Their Solicitors.

Dated October 15th, 1915.

H. B. BEELER,
 By MALCOLM E. ROSSER,
His Solicitors.

Dated October 15, 1915.

D. L. BERRYHILL,
 CHARLES S. SMITH,
 NORA WATSON, A MINOR;
 JOHN SMITH,
 LEWIS SMITH,
 LAWRENCE SMITH,
 GUY SMITH,
 ELLA LOONEY, *Née* SMITH,
 EDNA PIKE, *Née* SMITH,
 PEARLIE SMITH,
 WILLIS SMITH, A MINOR;
 J. S. TILLY,
Guardian of Willis Smith, a Minor;
 RANNIE SMITH,
 ELIZABETH RHYNE, *Née* SMITH,
 RASHIE C. SMITH,

MONTIE NUNN, *Née* SMITH, AND
LOU SMITH,
By J. B. FURRY,
E. C. MOTTER,
Their Solicitors.

Dated Oct. 15, 1915.

J. W. MCNEAL AND
L. W. BAXTER,
By HORACE SPEED,
Their Solicitor.

In the United States District Court for the Eastern District of
Oklahoma.

No. 2017-E.

UNITED STATES OF AMERICA, Appellant,
v.
BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the præcipe of appellant indicating the portions of the record to be incorporated in the transcript on the appeal in said cause is hereby acknowledged.

Dated October 15, 1915.

DAVE KNIGHT,
By ROWLAND, TALBOTT & NYCE,
His Solicitors.

In the United States District Court for the Eastern District of
Oklahoma.

No. 2017-E.

UNITED STATES OF AMERICA, Appellant,
v.
BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the præcipe of appellant indicating the portions of the record to be incorporated in the transcript on the appeal in said cause is hereby acknowledged.

Dated October 15th, 1915.

HOWARD WEBER,
By J. J. SHEA,
BURDETTE BLUE,
His Solicitors.

In the United States District Court for the Eastern District of
Oklahoma.

No. 2017-E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the præcipe of appellant indicating the portions of the record to be incorporated in the transcript on the appeal in said cause is hereby acknowledged.

Dated October 15, 1915.

SABER JACKSON,
By JOHN DEVEREUX,
His Solicitor.

In the United States District Court for the Eastern District of
Oklahoma.

No. 2017-E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the præcipe of appellant indicating the portions of the record to be incorporated in the transcript on the appeal in said cause is hereby acknowledged.

Dated October 15, 1915.

JACK GOUGE,
ERNEST GOUGE,
MATTIE BRUNER,
Formerly Mattie Phillips:
JENNIE PHILLIPS,
BILLIE PHILLIPS,
D. L. BERRYHILL, AND
WILLIAM McCOMBS,
By HASKELL B. TALLEY,
Their Solicitor.

In the United States District Court for the Eastern District of
Oklahoma.

No. 2017-E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the præcipe of appellant indicating the portions of the record to be incorporated in the transcript on the appeal in said cause is hereby acknowledged.

154 Dated October 15th, 1915.

CHARLES F. BISSETT,
TAXAWAY OIL COMPANY, A CORPORATION;

F. L. MOORE, AND
J. S. CODDEN,

By SHERMAN, VEASEY & DAVIDSON,
Their Solicitors.

In the United States District Court for the Eastern District of
Oklahoma.

No. 2017-E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the præcipe of appellant indicating the portions of the record to be incorporated in the transcript on the appeal in said cause is hereby acknowledged.

Dated October 15, 1915.

MARTHA JACKSON, A MINOR,
SABER JACKSON,

*As Guardian and Guardian ad litem and
Next Friend of Martha Jackson, a Minor, and*

J. COODY JOHNSON,

By J. COODY JOHNSON,
Their Solicitor.

In the United States District Court for the Eastern District of
Oklahoma.

No. 2017-E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the præcipe of appellant indicating the portions of the record to be incorporated in the transcript on the appeal in said cause is hereby acknowledged.

Dated October 15th, 1915.

MARTHA SIMMONS AND
HANNAH BULLETTE.

By WM. A. COLLIER.

Their Solicitor.

In the United States District Court for the Eastern District of
Oklahoma.

No. 2017-E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the præcipe of appellant indicating the portions of the record to be incorporated in the transcript on the appeal in said cause is hereby acknowledged.

155 Dated October 16th 1915.

JACK GOUGE,
ERNEST GOUGE,
MATTIE BRUNER,

Formerly Mattie Phillips;

JENNIS PHILLIPS,
BILLIE PHILLIPS, AND
WILLIAM McCOMBS,

By E. J. VAN COURT,
HAZEN GREEN,

Their Solicitors.

the United States District Court for the Eastern District of
Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the præcipe of appellant indicating the portions of the record to be incorporated in the transcript on the appeal said cause is hereby acknowledged.

Dated October 15th, 1915.

MAX H. COHN,

By LEDBETTER, STUART & BELL,

His Solicitors.

the United States District Court for the Eastern District of
Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Service of a copy of the præcipe of appellant indicating the portions of the record to be incorporated in the transcript on the appeal said cause is hereby acknowledged.

Dated October 29th, 1915.

M. M. TRAVIS,

Administrator of the Estate of Max H. Cohn, Deceased,

By BELL & FELLOWS,

His Solicitors.

In the District Court of the United States for the Eastern District of Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT et al., Appellees.

Service of praecipe for portions of record which the plaintiff desires printed, is hereby acknowledged this 15th day of October, 1915.

STUART, CRUCE & CRUCE,
Attorneys for Defendant Black Panther Oil and Gas Co.

Endorsed: Filed Oct. 30, 1915, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

156 And, to-wit, on the 1st day of November, A. D. 1915, the Interveners J. W. McNeal and W. L. Baxter filed praecipe suggesting additional portion of the record necessary for this appeal, which praecipe is in words and figures as follows:

Praecipe of J. W. McNeal and W. L. Baxter, Suggesting Additional Portion of Record Necessary for This Appeal.

Horace Speed.

Geo. T. Brown.

Law Offices of Speed & Brown, Tulsa, Okla.

October 30, 1915.

Clerk U. S. Court, Muskogee, Oklahoma.

DEAR SIR: In the case of the United States of America v. Bessie Wildcat, No. 2017, in Equity, please incorporate into the transcript which goes to the U. S. Circuit Court of Appeals, the intervening petition of J. W. McNeal and W. L. Baxter, and consider this letter as a praecipe on their behalf for so doing.

Very respectfully,

HORACE SPEED.

H. S. /H.

Endorsed: Filed Nov. 1, 1915. R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

the District Court of the United States within and for the Eastern District of Oklahoma.

THE UNITED STATES OF AMERICA, Complainant,

v.

BESSIE WILDCAT, Minor; SANTA WATSON, as Guardian of Bessie Wildcat; Cinda Lowe, Louisa Fife, Annie Wildcat, Emma West, Martha Jackson, Minor; Sabel Jackson, as Guardian and Next Friend of Martha Jackson; J. Coody Johnson, Aggie Marshall, Phillip Marshall, H. B. Beeler, Max H. Cohn, Black Panther Oil & Gas Company, a Corporation; Mattie Bruner, Formerly Mattie Phillips; Jennie Phillips, Billie Phillips, D. L. Berryhill, William McCombs, Barnossee Unussee, Fulhochee Barney, Siah Barney, Tommy Barney, Mollie Barney, Toney Chupko, Joseph Chupko, James C. Chupko, Eddie Larney, Polly Yargee, Née Larney; Tommy Chupko, Sarkarye Chupko, Dick Larney, a Minor; Moser Chupko, a Minor; Linda Harjo, Mary Jones, Loley Cooper, Hannah Bullette, Martha Simmons, Charles F. Smith, John Smith, Louis Smith, Lawrence Smith, Guy Smith, Ella Looney, Née Smith, Edna Pike, Née Smith; Pearl Smith, Nora Watson and Willis Smith, Minors; Rannie Smith, Elizabeth Rhyne, Née Smith; Rashie S. Smith, Montie Nunn, Née Smith; Lou Smith, 157 Saber Jackson, Jack Gouge, Ernest Gouge, Howard Weber; K. B. Turner and J. C. Stone, and K. B. Turner and J. C. Stone as Trustee for Barnossee Unussee, Fulhochee Barney, Siah Barney, Tommy Barney, Mollie Barney, Sam T. Palmer, K. B. Turner, M. E. Turner, Thomas H. Owen and J. C. Stone; Robert Owen Burton, Nathaniel Mack Burton, Lydia Belle Wilson, Née Burton; Samuel L. Burton, Abi L. Miller, Née Burton; Millie Ola Edwards, Née Burton; Mary Eliza Burton, David Knight, Charles F. Bassett, Taxaway Oil Company, a Corporation; F. L. Moore, J. S. Cosden, Johnathan R. Posey, Defendants.

No. 2017. In Equity.

Intervening Petition of J. W. McNeal and L. W. Barter.

J. W. McNeal and L. W. Baxter, residents and citizens of the City of Tulsa, in the Eastern District of the State of Oklahoma, pray to be allowed to intervene in the above entitled cause and set up their right, title and interest in and to the northwest quarter of section nine, township 18 north, range 7 east and to the oil and gas rights in said land against all the parties, both complainant and defendants and cross-complainants; and upon leave of court first had and obtained now file this their intervening petition against the said United States of America, and Bessie Wildcat, a minor, Santa Watson as guardian of Bessie Wildcat, Cinda Lowe, Louisa Fife, Anna Wildcat, Emma West, Martha Jackson, a minor, Saber Jackson as guard-

ian and next friend of Martha Jackson, J. Coody Johnson, Aggie Marshall, Phillip Marshall, H. B. Beeler, Max H. Cohn, Black Panther Oil & Gas Company, a corporation, Mattie Bruner, formerly Mattie Phillips, Jennie Phillips, Billie Phillips, D. L. Berryhill, William McCombs, Barnossee Unussee, Fulhohchee Barney, Siah Barney, Tommy Barney, Mollie Barney, Tommy Chupko, Joseph Chupko, James C. Chupko, Eddie Larney, Polly Yargee, née Larney, Toney Chupko, Sarkarye Chupko, Dick Larney, a minor, Moser Chupko, a minor, Linda Harjo, Mary Jones, Loley Cooper, Hannah Bullette, Martha Simmons, Charles F. Smith, John Smith, Louis Smith, Lawrence Smith, Guy Smith, Ella Looney, née Smith, Edna Pike, née Smith, Pearl Smith, Nora Watson and Willis Smith, minors, Rannie Smith, Elizabeth Rhyne, née Smith, Rashie C. Smith, Montie Nunn, née Smith, Lou Smith, Saber Jackson, Jack Gouge, Ernest Gouge, Howard Weber, K. B. Turner and J. C. Stone; and K. B. Turner and J. C. Stone as trustees for Barnossee Unussee, Fulhohchee Barney, Siah Barney, Tommy Barney, Mollie Barney, Sam T. Palmer, K. B. Turner, M. E. Turner, Thomas H. Owen and J. C. Stone, Robert Owen Burton, Nathaniel Mack Burton, Lydia Belle Wilson, née Burton, Samuel L. Burton, Abi L. Miller, née Burton, Mary Eliza Burton, David Knight, Charles Bissett, Taxaway Oil Company, a corporation, F. L. Moore, J. S. Cosden, Jonathan R. Posey, and for their cause of intervention say:

That on, to-wit, the first day of April, 1899, in the said Eastern District of Oklahoma, and in that part thereof known as the Creek Indian lands or reservation, the northwest quarter of section nine, township 18 north, range 7 east of the Indian meridian was a part of the lands belonging to the Creek Nation or Tribe of Indians authorized and directed under the laws of the United States and agreements between the United States and the said Creek Nation to be allotted to duly enrolled citizens and freedmen members of said Nation or Tribe of Indians. That among the persons then duly enrolled upon the official rolls of said nation as a citizen and member thereof was one Barney Thlocco, a Creek by blood and a member of said tribe, being the son of Hillabee Amarthla, a Creek Indian, and Linda, his wife, also a Creek by blood, and both upon said rolls as members and citizens of the Creek Nation by blood. That upon said rolls the said Barney Thlocco was shown to have been born on or about the 28th day of May, 1866, and he was thereupon in due form admitted to enrollment for allotment by the proper commission under the laws of the United States. He was admitted to enrollment under Roll No. 3021 and his enrollment was approved by the Secretary of the Interior on the 28th of March, 1902, and his name placed on the rolls of members by blood of said Creek Nation prepared by the Commission under authority of June 28th, 1898, opposite Roll No. 8592, which enrollment was approved by Sec. 28 of the Act of Congress entitled "An Act to ratify and confirm an agreement with the Choctaw and Chickasaw Tribes of Indians" and for other purposes, approved March 1, 1901; that the Secretary of the Interior on the 28th day of March, 1902, duly approved the en-

allment of said Barney Thlocco as a member by blood of said Creek Nation or Tribe of Indians, and thereafter, on June 30, 1902, the commission to the Five Civilized Tribes, acting under the laws of Congress in that behalf and under the direction and supervision of the Secretary of the Interior, allotted to said Barney Thlocco the said northwest quarter of section nine, township 18 north, range 7 east; and that on the 11th day of March, 1902, a patent was duly executed and recorded to said Barney Thlocco by P. Porter, Principal Chief of the Creek Nation or Tribe of Indians.

That the said Barney Thlocco was living on the first day of April, 1899, and after said first day of April in said year 1899 or in the year 1900, as these petitioners are informed and believe, and therefore charge the truth so to be, the said Barney Thlocco departed this life, intestate, leaving him surviving neither father nor mother, brother nor sister, nor wife nor issue; that the nearest relative to the said Barney Thlocco at the time of his death were the children and issue of his aunts, the sisters of his mother; that his mother had four sisters, to-wit, Maria, Malinda, Lucinda and Kizzie; that Maria had issue, Jack Gogue and Ernest Gouge, and no other issue; that Malinda, sometimes known as Winnie, had issue, D. L. Berryhill, and no other issue; that Lucinda had issue, Charles S. Smith, John F. Smith, Elizabeth Rhyne and Louis N. Smith, and no other issue; that the said John F. Smith died in, to-wit, 1905, leaving as his sole heirs at law Emma Smith, a daughter, John Smith, a son, Louis Smith, a son, Lawrence Smith, a son, Guy Smith, a son, Ella Looney, née Smith, a daughter, Edna Pike, née Smith, a daughter, Pearl Smith, a daughter, Willis Smith, a son, and Rannie Smith, his widow; that Willis Smith is a minor under the age of twenty-one years, and J. S. Tilly is his legal guardian, being duly appointed, qualified and acting by order of the County Court of Hughes County, State of Oklahoma; that said Emma Smith, daughter of said John F. Smith, died in 1907, intestate, and left as her only heir at law a daughter, Nora Watson, a minor under the age of eighteen years; that said Nora Watson has at this time no legal guardian; that said Louis N. Smith, the son of Lucinda Smith, died in 1909, intestate, leaving as his sole and only heirs at law a son, Rashie C. Smith, a daughter Montie Nunn, née Smith (enrolled Zular M. Smith), and the widow of Louis N. Smith, Lou Smith; that the said Kizzie, a sister of the said Linda, had issue, one daughter, to-wit, Sarah McCombs, who died in the year 1911 and left surviving as her sole and only heirs at law Billie Phillips, Mattie Bruner, née Phillips, Jennie Phillips, and William McCombs, her husband. That each of said four sisters of Linda died intestate at dates to these intervenors unknown.

That heretofore, to-wit, during the years 1913 and 1914 W. V. Thraves and R. C. G. Kiskaddon, commonly known as C. G. Kiskaddon, had offices together at Tulsa, Oklahoma, and were dealing together as jointly interested and partners in some matters of real estate and oil and gas leases; that during the year 1913 the said Thraves and the said Kiskaddon agreed between themselves that they would if possible obtain an oil and gas lease to all or a part

of the said northwest quarter of section nine, township 18 north range 7 east, and that they would share the expenses equally and would be equal partners in the profits; that under the said agreement and understanding and through the efforts of the said Thraves

and Kiskaddon there were taken oil and gas leases upon the said northwest quarter of section nine, township 18 north range 7 east from some of the heirs of the said Barnes

Thlocco, copies of which leases are hereto attached as a part here and marked Exhibits A, B and C, respectively. That for the expense in obtaining said leases and obtaining information concerning said quarter section of land and investigating its oil and gas bearing qualities or character, the said Thraves and Kiskaddon each as occasion required, paid the expenses incurred by each respectively, and at the end of each month or some other appropriate time calculated the expenses and equally divided them. That at that time their offices were together under lease to the said Thraves who paid the rentals to the landlord, and said Kiskaddon paid his share of the rentals to the said Thraves. That the said Thraves and Kiskaddon went together to view the said described tract of land at the same times, they were looking at other oil properties in the neighborhood, and agreed that they would endeavor to secure a lease upon same; that for convenience the leases were taken in the name of the said Kiskaddon, to-wit, as Charley G. Kiskaddon meaning R. C. G. Kiskaddon, in the lease obtained from D. W. Berryhill, which lease was secured by the said Thraves in person and for like convenience the leases from Mattie Bruner, Jennie Phillips, Billie Phillips and William McCombs and from Jacob Gouge and Ernest Gouge were taken in the name of C. G. Kiskaddon at the office of the said Thraves and Kiskaddon and in the presence of said Kiskaddon. That thereafter other expenses were incurred by said Thraves and Kiskaddon with reference to and growing out of said leases and the expenses were divided equally as theretofore; that at that time no oil production was upon said tract of land near thereto, the closest being within a distance of two or three miles the nearest well being in sections 19 and 20 in said township 18 north and range 7, the well in section 19 being one owned by the said Kiskaddon or a company in which he was a managing officer; said wells being in the Wheeler sand, the Bartlesville sand at this time not having been discovered in the Cushing oil field in which the said tract of land is situated; that after acquiring the said leases many difficulties arose and expenses had to be met in connection with said leases and other persons and with the government officers with reference to said tract of land; that the major part of the work involved in those efforts had to be borne by the said Thraves; that because thereof and because of some other transactions between them it was determined late in 1913 or early in 1914 between the said Thraves and Kiskaddon that said Kiskaddon would sell and dispose of his interest in said tract of land to said Thraves, and that

161 agreement was made between them to that effect. That as a result of the interest of said Kiskaddon in said tract of land should be turned over to said Thraves for a consideration agreed upon by

tween them; that under said agreement the said Kiskaddon ceased to bear any part of the expenses pertaining to the said tract of land or the leases thereon obtained as aforesaid, and thereafter there were many payments of money made because of said leases which were all borne and paid by the said Thraves to the knowledge of said Kiskaddon; that pursuant to said agreement letters were exchanged between said Thraves and Kiskaddon stating the agreement that for a consideration therein named the interest of said Kiskaddon should be transferred to said Thraves. That after the exchange of said letters other expenses as to said leases and under said leases arose, and each and all of them were paid by said Thraves, and no part thereof was paid or repaid at any time by said Kiskaddon; that the final payment for said interest of said Kiskaddon was to be paid on, to-wit, April 1, 1915; that prior to said date, on, to-wit, May 19, 1914, said Kiskaddon departed this life testate and that Mary M. Kiskaddon was under said will named executrix of said estate and thereupon she duly qualified and gave bond and was confirmed as such executrix, and entered upon the performance of her duties as such and so now remains; that payment of said sum was by said Thraves duly made to said executrix and that conveyance of the interest of said Kiskaddon in, to and under said leases was duly made to said Thraves. That the said Thraves for a valuable consideration sold, transferred and assigned all his right, title and interest under said leases and under his rights as a partner with said Kiskaddon to these intervening petitioners by his certain conveyance, a copy of which is hereto attached as a part hereof and marked Exhibit D.

That these intervening petitioners say that they are entitled under said conveyances and leases to a three-fourths interest in all the oil and gas produced or to be produced upon said tract of land, to-wit, the northwest quarter of section nine, township 18 north, range 7 east, since the date of said leases, to-wit, the month of August, 1913, subject, however, to the royalty due to the said lessors in said leases under the terms of the leases aforesaid.

These intervening petitioners respectfully show the court that without their knowledge or consent certain persons who were not the owners of said lease and not interested therein, and who are claiming antagonistic to the leases aforesaid, and to the rights of these intervening petitioners and of said Thraves and Kiskaddon under said leases aforesaid, have, in this court, entered into a combination together and thereunder did represent to this court
162 that they included all the heirs entitled to any rights or interests in and to any oil and gas to be taken from said tract of land, and did request this court to appoint a receiver for the oil and gas to be taken from said premises, and did request that this court order that a lease of all the oil and gas rights in and under said real estate be made, without asking any appraisalment or advertisement, and without asking any bonus, and that it be made to the Black Panther Oil and Gas Company upon a royalty or rental of 25% of the gross amount of oil and gas to be produced from said land by the said Black Panther Oil & Gas Company, which should

be paid by said Black Panther Oil & Gas Company to one J. F. Darby as such receiver or to such other person or corporation as the receiver might direct, and that the said Black Panther Oil & Gas Company be allowed and directed to drill three wells on said tract of land and drill such other wells as to the said Black Panther Oil & Gas Company might seem best, and take therefrom all the oil and gas produced during the continuance of the litigation in this cause; and that out of the suggested royalty of 25% should be first paid all the expenses of the receivership, and also that said Black Panther Oil & Gas Company be allowed, at the final termination of this action, for the reasonable cash value of its interest in the corporeal properties, such as derricks, machinery, piping, casing tanks, etc., owned by it and then on the premises and necessary in the development of the oil and gas on said premises up to an amount not exceeding the total amount of the royalty so to be paid by said Black Panther Oil & Gas Company; but that under said order there was no amount stipulated nor any percent stipulated which should go to the owners of said oil and gas or said real estate, nor was said amount left to be determined by the court, nor was said amount left to be ascertained by the persons actually the owners of the oil and gas rights in said land, but said request proposed that in order to ascertain the amount of the reasonable cash value of such physical properties, that one person should be appointed by the Black Panther Oil & Gas Company and one person by the prevailing party or parties in that action, and that those two persons should meet and consider and appraise the reasonable cash value of said improvements, and whatever sum is agreed upon between them should be reported by them in writing to the court and same shall be taken as reasonable cash value, but that if they were unable to agree upon same then and in that event the Black Panther Oil & Gas Company and the prevailing party or parties shall report such disagreement to this court, and this court will thereupon appoint some fit and disinterested person as the third appraiser, and the three appraisers

shall then meet and consider such reasonable cash value, and
163 the concurring opinion of any two of the three of them when reported in writing to this court, shall control and be conclusive as to such value between the said Black Panther Oil & Gas Company and the said prevailing party or parties, subject to the approval of the court.

These intervenors allege that at that time the interests of said owners under said leases were not represented in said court and no provision was made for the rights of the owners under said leases, nor were they given any opportunity under said proposed order to present the matter to the court or take judgment, nor were they to be heard as to the lease aforesaid to the said Black Panther Oil & Gas Company, nor was it to be possible to fix the value of such improvement until the end of the litigation and the final success of one of the parties, and no value could be fixed if the true owners turned out to be persons other than those so applying to have the oil and gas lease made: nor could the Black Panther Oil & Gas Company be prevented

from taking all the oil and gas, money and improvements to and for its own benefit and leave the property stripped of its great value.

That said application for receiver was made on the 8th day of April, 1914; that said application was not joined in by said Mattie Bruner, nee Phillips, nor Jennie Phillips, nor Billie Phillips, nor by William McCombs, nor Jack Gouge, nor Ernest Gouge, nor David L. Berryhill, nor any of them, nor was the same joined in by the said W. C. Thraves nor by the said R. C. G. Kiskaddon, nor were they made parties to said petition for the appointment of said receiver.

These intervenors show to the court that at the time said order was made neither R. C. G. Kiskaddon, who was then in life, nor W. C. Thraves were parties to said action, and under the terms of said application they could not be heard upon any question of value nor other question as to said lease.

These intervening petitioners further show to the court that the terms of the lease proposed were usual and unjust and should not be held to bind the owners of the rights under said leases taken in the name of said Kiskaddon; that the said proposed lease is an unusual one in that oil field and in the oil business in general, in this, to-wit, that at the end of the time of the lease and lessee is to be allowed out of the 25% royalty the then reasonable cash value of its interests in the corporeal property which it has been using and then on the property, to-wit, derricks, machinery, piping, casing, tanks, etc., and the value or costs of the wells drilled were to be allowed for by virtue of the provision that the expense of any dry holes drilled were not to be allowed for.

164 These intervenors allege that it is unusual, and so far as they know, without precedent that such provisions should be in an oil and gas lease; that it has been the usage always that the lessee pay these expenses.

These intervenors further show that the application was that the lease be made to Black Panther Oil & Gas Company without any advertising or any publicity, and without any opportunity to any regular oil producers to bid for the right to take said oil and gas from said land; that at that time the market was good for the leasing of such land at large values, and that individuals and corporations with abundant capital were ready and willing to take such property as the northwest quarter of section nine, township 18 north, range 7 east and pay a net bonus of 25% without any provision that the reasonable cash value of the corporeal property should be charged back to the owner or owners of the oil and gas rights in said land.

These intervenors further show to the court that at that time the Black Panther Oil & Gas Company was a corporation organized and existing under the laws of the State of Oklahoma; and the name "Black Panther" was taken from the nickname of one of the parties, to-wit, a colored citizen of the Creek Nation, one J. Coody Johnson by name, who won for himself the appellation "Black Panther" in the old territorial days, while working with the Creek Tribe of Indians, and who, by his ingratiating, insinuating and insidious characteristics of the animal for which he was named, was by the counsel of said tribe commonly designated and known as the "Black Pan-

ther"; when the said J. Coody Johnson had by his adroit and obsequious adulation, with the aid of his cohorts, and co-conspirators successively inveigled the officers of the government into agreeing to the unjust and unfair lease herein described, his associates did him the honor of naming this now celebrated company after him; and that while its authorized capital stock was stated at \$100,000.00 the petitioners are informed and believe, and therefore charge the truth so to be, that little or nothing was ever asked or paid in for the stock of said company, but that it was formed and organized with the intention and purpose of dividing the capital stock among the individuals who induced the making of the lease aforesaid; and that the Black Panther Oil & Gas Company had neither money in the treasury nor any other asset, nor was it in the oil and gas business, and had no experience in the oil business, and was not prepared for the handling and developing of the oil and gas rights on said property and was as aforesaid formed wholly and solely for the purpose of

165 handling and speculating in such oil and gas in said tract of land; that a judgment against said Black Panther Oil & Gas Company could not by execution or otherwise produce any result, unless said lease could be first had and profits or values obtained from said oil and gas rights in said land; that the Black Panther Oil & Gas Company has not now any property of any kind or character except such as has been obtained from the taking of oil and gas from said tract of land under the lease proposed by said application and order.

That thereafter, on the 17th day of April, 1914, being nine days after the filing of said application, an order of the court was signed apparently at the request of said applicants, which in said application stated that they were all of the parties interested, granted such lease to said Black Panther Oil & Gas Company, and that under said order a lease was executed, which was put on file, and copy of said lease is hereto attached as a part hereof and marked Exhibit . . . That under said lease the said Black Panther Oil & Gas Company entered into possession of said tract of land and has therefrom taken oil and gas as these intervening petitioners are informed and believe, and therefore charge the truth so to be, to the amount of \$800,000.00, and has paid over to the receiver aforesaid the sum of \$160,000.00, and no claim that they have improvements upon the said land which they will hold against the owners of said oil and gas rights to the amount of \$250,000.00, and that they will increase such claims for improvements to the extent of \$250,000.00; and that as one result of the provisions in said lease these intervening petitioners respectfully submit to the court that at the present time the Black Panther Oil & Gas Company claims to have expended in such improvements the amount of, to-wit, \$250,000.00, and it is by the said Black Panther Oil & Gas Company and its associates now asserted that they will spend upon such alleged improvements before they are through developing said tract of land the sum of \$500,000.00, for which they will expect to be reimbursed by the persons owning the oil and gas rights in said land under the decree of this court, to be charged against the owners upon the theory that it is to be taken out of said royalty for said oil and gas

These intervening petitioners respectfully show that under these conditions the Black Panther Oil & Gas Company now claims that the owners of the oil and gas in said tract of land are indebted to them in the sum of \$250,000.00, or a sum, to-wit, of \$100,000.00 more than the royalty on all the oil and gas so far taken from said premises, and that the amount of \$2,000,000.00 must be taken from said tract of land in oil before one cent can be paid over to the owners of the oil and gas rights in said land.

166 These intervenors further show to the court that when all of the oil and gas from said land is exhausted, said derricks, machinery, piping, casing, tanks, etc., will be wholly valueless and the same would be a total loss to the owners of said tract of land and to the owner or owners of the oil and gas rights in said land, and that such loss, which is usually and necessarily under ordinary leases borne by the lessee, is by the form of the proposed lease in said application shifted from the lessee to the lessor, and the valuation at such time is by the proposed order to be not the reasonable value to the owner or owners of the oil and gas rights in said land, but the reasonable cash value of the interests of the Black Panther Oil & Gas Company in said property which would necessarily mean the value of said property when properly taken care of and sold in the market where such properties are needed. That the owners of the oil and gas rights could not by any possibility be considered able or competent persons to obtain a fair price for such properties, whereas the lease of such rights could more properly be expected to dispose of such properties at a fair price or use them at other places where it might be doing business.

That there have been since said lease was made fourteen or fifteen wells drilled on said property, and that there are to be drilled on same eighteen or twenty additional wells in order to fully drain and exhaust said lands of its oil and gas; that the Black Panther Oil & Gas Company under said lease has, as these petitioners are informed and believe, and therefore charge the truth so to be, given a bond to J. F. Darby as receiver for the use and benefit of the parties interested in said action in the sum of \$25,000.00 to be approved by said J. F. Darby as receiver aforesaid, conditioned that the said Black Panther Oil & Gas Company would faithfully carry out and perform the provisions of its agreement with the receiver. Other than that, there is no bond given by said Black Panther Oil & Gas Company to pay the 25% of the gross amount of oil and gas produced from said land, nor is there any bond to the persons who are the true owners of the oil and gas rights in said land conditioned that the said Black Panther Oil & Gas Company will pay to the true owners or any of them the true amount of 25% of the gross amount of oil and gas taken from said land, nor has the said Black Panther Oil & Gas Company any assets out of which judgment could be made except oil and gas so taken from said land.

These intervening petitioners further show that the bond of \$25,000.00 from the Black Panther Oil & Gas Company is not a sufficient bond where the amount of oil and gas already taken from said land is the sum of \$800,000.00 in value, which may run into several millions of dollars; that said bond as a matter of law

is not given or onforceable for the use and benefit of the owners of said oil and gas rights and could not be enforced in their behalf, even to the extent of said \$25,000.00; that at the time said bond was given the said Thraves and Kiskaddon were not parties to this action and such bond would not protect and did not protect any right whatever under the leases made in the name of said Kiskaddon as lessee as aforesaid, and as to the owners of the oil and gas rights under those leases the oil is being taken out by the Black Panther Oil & Gas Company without any security to the owners of such oil and gas rights whatsoever.

These intervening petitioners further show that this court on, to-wit, the 8th day of May, 1915, held, ordered and adjudged that the United States of America and the Creek Nation of Indians had no interest whatever in said tract of land, but that all the right, title and interest of the said United States of America and the Creek Nation of Indians in and to said land had been conveyed and passed by the patent to the said Barney Thlocco and was and is existing in his true heirs and inured to the benefit of them and their issue.

And these petitioners further show that if the leases to the said C. G. Kiskaddon aforesaid are valid, as these intervening petitioners aver, then and in that case the existing lease to said Black Panther Oil & Gas Company was made without their knowledge, consent or acquiescence and ought not to be considered a valid or existing conveyance or lease, and that the bond aforesaid is expressly limited to be in favor of the parties then to said action and that therefore said bond is not a bond in favor of the persons holding under said leases made in the name of said Kiskaddon or these intervening petitioners.

That since the court has declared that the heirs of Barney Thlocco are the owners of said property, it is eminently proper that the court should at this time order the entire property into the hands of a receiver for the purpose of conserving the entire property for the heirs or nearest of kin ultimately adjudged the owners of same; that the production of oil from said property is sufficient to defray the expenses of the further development of said property, and that such a receiver would save to the ultimate owners of said property three-fourths of the oil extracted from same which is now being appropriated by the Black Panther Oil & Gas Company under the original receiver's lease; that unless this is done and the court orders the said land into the hands of a receiver, the Black Panther

Oil & Gas Company, before this litigation is ended, if the
168 customary procedure is followed, will have entirely absorbed or dissipated the said property, leaving to the final owners such improvements as the amount of royalty accumulated in the hands of the said receivers, J. F. Darby, may be sufficient to pay for. That but for the saving clause in the court order appointing said receiver, which reads as follows: "But the amount so to be allowed to the said Black Panther Oil & Gas Company shall in no event exceed the amount of royalty that has accrued in the hands of the said receiver for the benefit of the prevailing party or parties

to this suit," the receiver would now be in debt to the Black Panther Oil & Gas Company in a large sum of money, to-wit, more than \$100,000.00.

These petitioners further show that after the lease was made to said Black Panther Oil & Gas Company, said company did not proceed to do the drilling itself, but did contract with the Oklahoma Petroleum Company to do such drilling for one-half of the production. That said Oklahoma Petroleum Company was a corporation of the State of Delaware and had no property or assets in the State of Oklahoma so far as these petitioners are informed and believe, and therefore charge the truth so to be, nor were the persons owning and controlling the stock in said Oklahoma Petroleum Company professional operators, drillers or oil men, but were speculators.

That thereafter on, to-wit, the 24th day of August, 1914, the Oklahoma Petroleum Company assigned its interest under said lease and its contract with said Black Panther Oil & Gas Company to Howard Weber, in consideration whereof said Howard Weber surrendered to C. N. Haskell and L. E. Haskell their note of \$17,750.00 and executed to Joseph L. Hall six notes aggregating \$36,050.00 and agreeing to give to said Hall or order oil to the extent of \$20,000.00 amounting in all to a total of \$73,800.00, but nothing was given therefor to the Oklahoma Petroleum Company.

These petitioners further respectfully show to the court that on, to-wit, the 21st day of November, 1914, a contract and agreement was entered into by and between Barnossee Unussee, Fulhochee Barney, Siah Barney, Tommy Barney, Mollie Barney, Sam T. Palmer, K. B. Turner, M. E. Turner, Thomas H. Owen and J. C. Stone, of the first part, and said Black Panther Oil & Gas Company and said Howard Weber of the second part, and K. B. Turner and J. C. Stone as trustees, of the third part, under which the said first parties undertook to lease unto said second parties the said northwest quarter of section nine, township 18 north, range 7 east, containing 160 acres, more or less, for so long a time as oil or gas

or either of them is produced from said land upon payment
169 by said parties of the second part to said trustees for the use and benefit of the first parties of one-tenth of the gross proceeds of the sale of all oil and gas produced from said premises so long as production is had from and after November 7th, 1914; provided that the one-tenth royalty produced from a five-acre tract of said land known as the Posey tract should not be payable pending the final result of this cause, to-wit, No. 2017 in Equity, and with further provisions more particularly set out in said contract, a copy of which is hereto attached as a part hereof, and marked Exhibit F.

These petitioners further allege that under said contract said Black Panther Oil & Gas Company and said Howard Weber have been and are now paying out one-tenth of the proceeds of said oil from said tract of land and are not holding same and cannot account therefor under the law in case these petitioners or any persons other than the parties to said contract succeed in the trial of this cause, and can not return nor properly account for or replace the value

of said oil if the United States of America or the Creek Nation are entitled to demand repayment thereof; that said Black Panther Oil & Gas Company has, since the first day of January, 1915, without regard to its liabilities and responsibilities hereinbefore recited, paid out to its stockholders in the form of dividends the sum of, to-wit, \$50,000.00.

Your petitioners further show to the court that said Black Panther Oil & Gas Company and said Howard Weber have not paid for a large part of the improvements upon the said tract of land used for the taking of oil and gas under the aforesaid lease, but that the materials and improvements are unpaid for at this time to the extent of, to-wit, \$75,000.00, and the same is a lien, if said lease be a valid lease, upon the interest of whoever is the true owner or owners of said land and said oil and gas rights; that these petitioners allege that the same is a grave injury and wrong to the rights of these petitioners.

To the end therefore that the defendants and each of them severally make a true, full and perfect answer to each of the allegations of these intervening petitioners and may and will perform the orders of this court in the premises, these intervening petitioners pray that a writ of subpoena issue out of this court to each of the said defendants to this intervening petition, to-wit, Bessie Wildcat, minor, Santa Watson as guardian of Bessie Wildcat, Cinda Lowe, Louisa Fife, Annie Wildcat, Emma West, Martha Jackson, minor, Saber Jackson as guardian and next friend of

Martha Jackson, J. Coody Johnson, Aggie Marshal, Phillip
170 Marshall, H. B. Beeler, Max H. Cohn, Black Panther Oil
& Gas Company, a corporation, Mattie Bruner, formerly
Mattie Phillips, Jennie Phillips, Robert Owen Burton, Nathaniel
Mack Burton, Lydia Belle Wilson, née Burton, Samuel L. Burton,
Abi L. Miller, née Burton, Millie Ola Edwards, née Burton, Mary
Eliza Burton, David Knight, Charles F. Bissett, Taxaway Oil Com-
pany, a corporation, F. L. Moore, J. S. Cosden, Jonathan R. Posey,
Billie Phillips, D. L. Berryhill, William McCombs, Barnossee
Unussee, Fulhochee Barney, Siah Barney, Tommy Barney, Mollie
Barney, Toney Chupko, Joseph Chupko, James C. Chupko, Eddie
Larney, Polly Yargee, née Larney, Tommy Chupko, Sarkarye
Chupko, Dick Larney, a minor, Moser Chupko, a minor, Linda
Harjo, Mary Jones, Loley Cooper, Hannah Bullette, Martha Sim-
mons, Charles F. Smith, John Smith, Louis Smith, Lawrence Smith,
Guy Smith, Ella Looney, née Smith, Edna Pike, née Smith, Pearl
Smith, Nora Watson and Willis Smith, minors, Rannie Smith,
Eligazeth Rhyne, née Smith, Rashie C. Smith, Montie Nunn, née
Smith, Lou Smith, Saber Jackson, Jack Gouge, Earnest Gouge,
Howard Weber, K. B. Turner and J. C. Stone; and K. B. Turner
and J. C. Stone as trustees for Barnossee Unussee, Fulhochee Bar-
ney, Siah Barney, Tommy Barney, Mollie Barney, Sam T. Palmer,
K. B. Turner, M. E. Turner, Thomas H. Owen and J. C. Stone,
directing them and each of them that they appear in this
court in this cause at a court day and set up their answer or defense

and stand to and perform the orders and decrees of this court in the premises.

Wherefore these intervening petitioners pray that the existing lease to the said Black Panther Oil & Gas Company be declared invalid and null and void and does not authorize the taking of any additional oil from said real estate; and that the court require that an accounting be made by the Black Panther Oil & Gas Company and Howard Weber for the amount of oil produced, the amount of oil sold, the prices received therefor, to whom it was distributed, the quantity to each, the expenses of the Black Panther Oil & Gas Company and Howard Weber in detail in the operation of said property, the amount that should now be allowed the Black Panther Oil & Gas Company and Howard Weber, that they be required to account for all oil taken out, including their reasonable and necessary expenses for drilling wells and performing their labor in and about the construction and development of oil wells, apparatus and tanks, piping, casing, tools, machinery and other equipment; that a receiver be appointed with directions to take charge of the oil and gas wells on said land and the equipment on said premises and all the oil in and upon said land in tanks or otherwise, and all moneys, assets and property in the hands
171 or under the control of the present receiver, and that he operate said property under orders of this court and make monthly reports to this court of his proceedings in the premises.

And these intervening petitioners further pray that upon the hearing of this action the court order and decree that the right, title and interest in and to said oil and gas in and under the said northwest quarter of section nine, township 18 north, range 7 east and taken therefrom by said Black Panther Oil & Gas Company and Howard Weber is and should be the property of these intervening petitioners and the other heirs of the sisters of Linda, the mother of said Barney Thlocco, and decree that said Black Panther Oil & Gas Company and Howard Weber shall turn over to said receiver for the benefit of these intervening petitioners and said heirs all the oil they now have and to account for all of the oil and gas they have disposed of, and to render an accounting showing their necessary expenses in the premises, for which this court should allow a reasonable compensation and reimbursement; that they pay over to said receiver for the benefit of these intervening petitioners and said heirs the remainder of the value of all the oil and gas taken from said premises. And these intervening petitioners pray for all other relief equitable and proper in the premises.

J. W. McNEAL,
L. W. BAXTER,
By HORACE SPEED,
Their Attorney.

W. V. THRAVES,
Of Counsel.

STATE OF OKLAHOMA,
Tulsa County, ss:

J. W. McNeal and L. W. Baxter, being first duly sworn, upon oath, each for himself, deposes and says that he has read the foregoing intervening petition and knows the contents thereof, and that the allegations therein are true, as he is informed and verily believes.

J. W. McNEAL.

L. W. BAXTER.

Subscribed and sworn to before me, a notary public within and for the County of Tulsa, State of Oklahoma, on this 7th day of June, 1915.

[SEAL.]

CHESTER A. STACY,

Notary Public.

My commission expires Aug. 29, 1916.

"EXHIBIT D."

Oil and Gas Lease.

This agreement made and entered into this 21st day of November, 1914, by and between Barnessee Unussee, Fulhohchee
172 Barney, Siah Barney, Tommy Barney, Mollie Barney, Sam
T. Palmer, K. B. Turner, M. E. Turner, Thomas H. Owen
and J. C. Stone of the first part, hereinafter called lessors, and Black
Panther Oil & Gas Company a corporation, and Howard Weber of
the second part, hereinafter called lessees, and K. B. Turner and
J. C. Stone, parties of the third part, as Trustees, for parties of the
first part, Witnesseth:

That said lessors for and in consideration of the sum of \$1.00
in hand paid and of the covenants and agreements hereinafter con-
tained, as their respective interests may appear, have granted,
bargained, leased and let, and by these presents do grant, demise,
lease and let unto said lessees, for the sole and only purpose of min-
ing and operating for oil and gas and of laying pipe lines and of
building tanks, power stations and structures thereon, to produce,
save and take care of said production, all that certain tract of land
situate in Creek County, State of Oklahoma, described as follows,
to-wit: the northwest quarter of section 9, township 18 north, range
7 east, the Barney Thlocco allotment, containing 160 acres, more
or less, according to the government survey thereof.

I.

It is agreed that this lease shall remain in force so long as oil
and gas or either of them is produced from said land.

II.

Parties of the second part shall pay or cause to be paid to the

es of the third part or their successors in trust for the use and fit of the parties of the first part, their heirs or assigns, as their rests may appear, one-tenth ($1/10$) of the gross proceeds of all oil and gas produced from said premises, the same to be payable as production is had, run and sold from and after the 7th day of September, 1914, it being agreed there was on hand on the 7th day of September, 1914, sixty thousand (60,000) barrels of oil, and that the proceeds from the sale of the first sixty thousand (60,000) barrels of oil sold after November 7th, 1914, shall be received by the Black Panther Oil & Gas Co. and Weber; provided, however, that one-tenth ($1/10$) royalty insofar as same is produced from a certain five acres known as the "Posey tract," to-wit, the west half of the southwest quarter of the southwest quarter of the northwest quarter shall not be payable pending the final result of the case pending in the United States Court at Muskogee, No. 2017 in Equity, styled United States v. Bessie Wildcat and others, and said royalty shall be payable when and upon the condition that final decree is entered in said cause against said Posey, Charles F. Bissett and others claiming through an alleged filing upon said five acres by said Posey; provided, further, that said trustees shall pay or cause to be paid from their said moneys as same becomes payable to said trustees, to Howard Weber, or his heirs, the one-fourth ($1/4$) part thereof, until said one-fourth amounts to \$6,000.

III.

If any of the parties of the first part or any of them win by final decree in said cause they shall share according to their established interest in the land the 25% paid and to be paid into the hands of the receiver in said cause and the same shall be paid to said trustees; and after final decree, their royalty shall continue upon the 25% basis, viz: twenty-five percent (25%) of the gross proceeds of sales of the land that they shall receive as from the first of the developments to the end of the lease that part of the 25% royalty which their receiver may bear to the whole title; and said ten percent (10%) royalty shall be deducted from the total amount due the parties of the first part upon the twenty-five percent (25%) royalty basis. The same shall be repaid by the receiver to the Black Panther Oil & Gas Company and Howard Weber equally out of the 25% royalty now being impounded in the hands of J. F. Darby, receiver.

IV.

If the United States, by final decree, wins in said suit and cancels the allotment of Barney Thlocco, then upon payment of said 10% royalty as provided herein accrued to that date, this contract shall terminate.

V.

If any person or persons other than Martha Jackson, Barnossee, Fulhohchee Barney, Siah Barney, Tommy Barney or

Mollie Barney shall win by final decree in said cause, the entire title of said property, then this contract shall terminate of date of said final decree the payment of all sums due hereunder. In case Martha Jackson shall finally be decreed to be the owner of any portion of the land above described, and the other claimants, parties to this contract shall be denied any ownership in said land by final decree, then and in that event, the lessees herein, or their assigns, shall continue to pay to said trustees for the use and benefit of the parties of the first part, one-tenth ($1/10$) royalty on all the oil and gas produced from that portion of said land finally decreed to Martha Jackson.

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VI.

By final decree as used herein is meant the final judgment or decree in said cause after decision by the Supreme Court of the United States or the abandonment of the right of appeal.

VII.

It is agreed by the parties of the first part that they will not while oil and gas being produced from the premises described herein, execute any agricultural or grazing lease upon said premises or take possession of the surface of said land either themselves or through any one else without the written consent of the lessees herein or their assigns.

VIII.

It is understood by and between the parties hereto that this lease contract is not intended as a recognition of the claim of the title of anybody hereto superior to that of any other and that this lease is not intended to effect in any way the rights of any of said parties as between themselves under contracts now existing.

IX.

Said second parties shall have the right to use any timber now upon said land, the right to use any water thereon, or to impound water by dams, ponds, tanks or otherwise, to erect and maintain wooden and steel tankage for the proper operation of the lease. Said second parties shall have the right, at the termination of this lease, or when it shall cease to produce oil and gas, to remove all equipment, derricks, machinery, buildings, pipe lines and casing from said land and shall have a period of ninety (90) days after the expiration of said lease in which to remove the same.

Said parties of the second part shall have the use of gas produced from said premises, free of charge, for the purpose of conducting operations upon said lease for oil and gas and for the purpose of heating any building that they may erect thereon.

n witness whereof the parties hereto have set their hands and
s on this the 21st day of November, 1914.
Executed in Quadruplicate.

FULHOHCHEE BARNEY, (Her Thumb Mark);
SIAH BARNEY, (His Thumb Mark);
TOMMY BARNEY, (His Thumb Mark);
MOLLIE BARNEY, (Her Thumb Mark);
Parties of the First Part.

BLACK PANTHER OIL & GAS COMPANY,
By JAMES BRAZZELL, *Pres.* [CORPORATE SEAL.]
HOWARD WEBER,
By JOHN J. SHEA, *Att'y in Fact,*
Parties of the Second Part.

J. C. STONE,
K. B. TURNER,
Parties of the Third Part, as Trustees.

Attest:
C. T. GOW.

Signature of Fulhohchee Barney, Siah Barney, Tommy Barney
and Mollie Barney witnessed by me at their request and in their
presence.

Wit:
FELIX P. CANARD.
WALLACE C. COOK.

BARNOSSEE UNUSSEE,
J. C. STONE,
K. B. TURNER,
SAM T. PALMER,
M. E. TURNER,
THOMAS H. OWEN.

O. K.:
J. G. HARLEY,
Att'y for Black Panther Oil & Gas Co.

O. K.:
HOWARD WEBER,
By J. J. SHEA.

Examined and approved this 23rd day of November, 1914.
[C. J. Seal.] • T. H. WRENN,
County Judge.

Addenda to Section 5.

It is stipulated and agreed that Section 5 of the foregoing con-
tract and its provisions with reference to the recovery of Martha

Jackson shall also apply to Saber Jackson and any interest, if any, he may be decreed in said land in controversy.

BLACK PANTHER OIL & GAS CO.,
By J. G. HARLEY,
C. B. STONE, AND
J. C. JOHNSON,

Its Att'ys.

HOWARD WEBER,
By JOHN SHEA, *Att'y in Fact.*

Parties of the Second Part.

EXHIBIT —.

Oil and Gas Lease.

Agreement, Made and entered into the 15th day of August, A. D. 1913, by and between Mattie Bruner, formerly Mattie Phillips, Jennie Phillips, Billie Phillips and William McCombs of 176 Eufaula, Okla., parties of the first part, lessors, and C. G. Kiskaddon of Tulsa, Okla., party of second part, lessees.

Witnesseth, That the said parties of the first part, for and in consideration of the sum of One Dollar to them in hand well and truly paid by the said party of the second part, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the party of the second part to be paid, kept and performed, have granted, demised, leased and let and by these presents do grant, demise, lease and let unto the said second party his heirs, executors, administrators, successors or assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, powers, stations and structures thereon to produce and take care of said products, all that certain tract of land situate in the County of Creek, State of Oklahoma, described as follows, to-wit: The Northwest Quarter (N. W. ¼) of section 9, township 18 N., range 7 east and containing 160 acres, more or less.

It is agreed that this lease shall remain in force for a term of five years from this date and as long thereafter as oil or gas, or either of them, is produced from said land by the party of the second part his heirs, administrators, executors, successors or assigns.

In consideration of the premises the said party of the second part covenants and agrees:

1st. To deliver to the credit of the owners as hereinafter provided, their heirs or assigns, free of cost, in the pipe line to which it may connect its wells, the equal one-eighth ($\frac{1}{8}$ th) part of all oil produced and saved from the leased premises.

2nd. To pay the owners as hereinafter provided One Hundred Fifty Dollars each year in advance, for the gas from each well where gas only is found, while the same is being used off the premises, and the first parties to have gas free of cost from any such well for stoves

ad inside lights in the principal dwelling house on said land during the same time by making their own connections with the well.

3rd. To pay the first party for gas produced from any oil well and used off the premises at the rate of Fifty Dollars per year, for the time during which such gas shall be used, said payments to be made each three months in advance.

The party of the second part agrees to complete a well on said premises within one year from the date hereof, or pay owners at

the rate of One Hundred Sixty Dollars for each additional year such completion is delayed from the time above mentioned for the full completion of such well until a well is completed; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rent under this provision during the remainder of the term of this lease.

The party of the second part shall have the right to use, free of cost, gas, oil and water produced on said land for its operations thereon, except water from wells of first party.

When requested by first party, the second party shall bury its pipe lines below plow depth.

No well shall be drilled nearer than 200 feet to the house or barn on said premises.

Second party shall pay for damages caused by drilling to growing crops on said land.

The party of the second part shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.

The party of the second part shall not be bound by any change in ownership of said land until duly notified of any such change either by notice in writing duly signed by the parties to the instrument of conveyance, or by receipt of the original instrument of conveyance, or a duly certified copy thereof.

All payments which may fall due under this lease may be made directly to the first parties or deposited by second party to their credit in Eufaula National Bank of Eufaula, Okla.

The party of the second part, its successors or assigns shall have the right at any time, on the payment of Ten Dollars to the parties of the first part, their heirs or assigns to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine; provided, this surrender clause and the option therein reserved to the lessee shall cease and become absolutely inoperative immediately and concurrently with the institution of any suit in any court of law or equity by the lessee to enforce this lease, or any of its terms, or to recover possession of the leased land, or any part thereof, against or from the lessors their heirs, executors, administrators, successors or assigns, or any other person or persons. All covenants and agreements herein set forth between the parties hereto shall extend to their successors, heirs, executors, administrators and assigns.

It is understood and agreed that the first parties are only part owners of the above described premises and the proportion to be

178 paid them of the royalties, rentals and other sums payable hereunder by the second party, shall be that proportion which the interest of the first parties in said premises bears to the entire interest.

Witness the following signatures and seals:

MATTIE BRUNER, [SEAL.]

Formerly Mattie Phillips.

JENNIE PHILLIPS. [SEAL.]

BILLIE PHILLIPS. [SEAL.]

WM. McCOMBS. [SEAL.]

(Acknowledgment to the Lease.)

STATE OF OKLAHOMA,

County of —, ss:

Be it Remembered, That on this 21st day of August, in the year of our Lord one thousand nine hundred and thirteen, before me, a notary public in and for said County and State, personally appeared Mattie Bruner, formerly Mattie Phillips, Jennie Phillips, Billie Phillips, and William McCombs to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

In witness whereof I have hereunto set my official signature and affixed my notarial seal the day and year first above written.

[SEAL.]

RALPH L. ROE,
Notary Public.

My commission expires May 14th, 1917.

EXHIBIT —.

Oil and Gas Mining Lease.

This Indenture Made this 5th day of August, A. D. 1913, by and between D. L. Berryhill of Okmulgee, Okla., party of the first part, and Charley G. Kiskaddon of Tulsa, Okla., party of the second part,

Witnesseth: That first party, for and in consideration of the sum of One Dollar (\$—) unto first party well and truly paid by second party, at or before the signing and delivery hereof, the receipt whereof the first party does hereby acknowledge, has granted, demised and let, and by these presents does grant, demise and let unto the second party, all the oil and gas in and under the following described tract of land, and also the said tract of land itself, for

the purpose of operating thereon for oil and gas, with the right to use water therefrom and with all rights and privileges necessary or convenient for conducting the said oil and gas operations, and for the transportation of oil and gas from and over the said tract of land, and waiving all right to claim or hold, as fixtures or part of the realty, any of the property and improvements which second party may place or erect in or upon said land, and agreeing that all such property or improvements may be removed by second party at any time before or after the termination hereof. The said tract of land is situate in Creek County, State of Oklahoma, and is more particularly described as follows: The Northwest Quarter (N. W./4) section 9, township 18 N., range 7 E., containing 160 acres, more or less; but no well shall be drilled within — feet of the present buildings on said tract of land without the consent of first party. First party expressly releases and waives all rights under and by virtue of the homestead exemption laws of the State of Oklahoma.

To have and to hold the same unto the said party of the second part, its successors and assigns, for the term of 15 years from the date hereof, and as much longer as oil or gas is found in paying quantities, excepting and reserving to first party the one-eighth part of all the oil produced and saved from the said premises to be delivered into the pipe line to the credit of first party free of cost, and should any well produce gas in sufficient quantities to justify marketing the same, second party shall pay therefor at the rate of \$150.00 (\$150.00) per annum, payable within thirty days from the time that gas is used therefrom, and yearly thereafter for such time as gas therefrom is so marketed. And first party shall also, so long as gas is so utilized, have gas free of cost sufficient for — stoves and — lights in one dwelling house on said tract of land, such gas to be delivered to first party at the well, and all pipe or connections therefrom to the dwelling house to be laid and made by first party; second party shall also have the right to use sufficient gas, oil or water from the premises to run all necessary machinery for drilling or operating its wells on said land.

Second party agrees to complete a well on the above described tract of land within one year from date perfect title is vested in party of second part thereafter pay first party a rental of One Hundred Sixty Dollars (\$—) per annum, payable annually in advance until such well is completed. All payments under this lease may be made by check mailed direct to first party at Okmulgee, Oklahoma, or deposited to the credit of the first party in the First National Bank of Okmulgee, Okla., and any payment due hereunder made by depositing the same to the credit of first party in said bank, shall bind any subsequent purchaser of the above described land with the same effect as though said payment were made direct to said purchaser.

For the consideration above named first party also grants to second party the right at any time, upon payment to first party of — Dollars (\$—) to surrender up this lease and be discharged from all liability thereunder arising after such surrender, and upon such sur-

render this lease shall at once cease and determine and no longer be binding upon either party, Provided, that in the event any suit or action is brought in any court by the lessee to enforce this lease, then this clause, providing for a surrender of this lease by the second party, shall become inoperative and of no effect between the parties from the time of the commencement of such suit or action.

This lease shall bind and run in favor of the respective heirs, executors, administrators, successors and assigns of the parties hereto.

In Witness Whereof, the parties have hereunto set their hands and affixed their seals the day and year first above written.

D. L. BERRYHILL. [SEAL.]

Approved Aug. 5th, 1913.

[SEAL.] MARK L. BOZARTH,
County Judge.

STATE OF OKLAHOMA,
County of Okmulgee, ss:

Before me, a notary public in and for said County and State, on this 5th day of August, 1913, personally appeared D. L. Berryhill to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

[SEAL.]

A. R. WINFREY,
Notary Public.

My commission expires June 26, 1916.

EXHIBIT —.

Oil and Gas Lease.

Agreement, Made and entered into the 22nd day of August, A. D. 1913, by and between Jack Gouge and Earnest Gouge of Hanna, Okla., parties of the first part, lessors, and C. G. Kiskaddon of Tulsa, Okla., party of the second part, lessees.

Witnesseth, That the said parties of the first part, for and in consideration of the sum of One Dollar to them in hand well and
181 truly paid by the said party of the second part, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the party of the second part to be paid, kept and performed, have granted, demised, leased and let and by these presents do grant, demise, lease and let unto the said second party his heirs, executors, administrators, successors or assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, powers, stations and structures thereon to produce and take care of said products, all that certain tract of land situate in the County of Creek, State of Oklahoma, described as follows, to-wit: The North-

west Quarter (NW4) of section 9, township 18 N., range 7 east and containing 160 acres, more or less.

It is agreed that this lease shall remain in force for a term of five years from this date and as long thereafter as oil or gas, or either of them, is produced from said land by the party of the second part his, administrators, executors, successors or assigns.

In consideration of the premises the said party of the second part covenants and agrees:

1st. To deliver to the credit of the owners as hereinafter provided their heirs or assigns, free of cost, in the pipe line to which it may connect its wells, the equal one-eighth ($\frac{1}{8}$ th) part of all oil produced and saved from the leased premises.

2nd. To pay the owners at the rate of One Hundred Fifty Dollars each year in advance, for the gas from each well where gas only is found, while the same is being used off the premises, and the first part to have gas free of cost from any such well for — stoves and — inside lights in the principal dwelling house on said land during the same time by making — own connections with the well.

3rd. To pay the owners as hereinafter provided for gas produced from any oil well and used off the premises at the rate of Fifty Dollars per year, for the time during which such gas shall be used, said payments to be made each three months in advance.

The party of the second part agrees to complete a well on said premises within one year from the date hereof, or pay at the rate of One Hundred Sixty Dollars for each additional year such completion is delayed from the time above mentioned for the full completion of such well until a well is completed; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rent under this provision during the remainder of the term of this lease.

182 The party of the second part shall have the right to use, free of cost, gas, oil and water produced on said land for its operations thereon, except water from wells of first party.

When requested by first party, the second party shall bury its pipe lines below plow depth.

No well shall be drilled nearer than 200 feet to the house or barn on said premises.

Second party shall pay for damages caused by drilling to growing crops on said land.

The party of the second part shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.

The party of the second part shall not be bound by any change in ownership of said land until duly notified of any such change, either by notice in writing duly signed by the parties to the instrument of conveyance, or by receipt of the original instrument of conveyance, or a duly certified copy thereof.

The payments which may fall due under this lease may be made directly to the first parties or deposited by the second party to their credit in Eufaula National Bank of Eufaula, Okla.

The party of the second part, its successors or assigns shall have

the right at any time, on the payment of Ten Dollars to the parties of the first part, their heirs or assigns to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine; provided, this surrender clause and the option therein reserved to the lessee shall cease and become absolutely inoperative immediately and concurrently with the institution of any suit in any court of law or equity by the lessee to enforce this lease, or any of its terms, or to recover possession of the leased land, or any part thereof, against or from the lessors, their heirs, executors, administrators, successors or assigns, or any other person or persons. All covenants and agreements herein set forth between the parties hereto shall extend to their successors, heirs, executors, administrators and assigns.

It is understood and agreed that the first parties are only part owners of the above described premises, and the proportion to be paid them of the royalties, rentals and other sums payable hereunder by the second party, shall be that proportion thereof which the interest of the first parties in said premises bears to the entire interest.

183 Witness the following signatures and seals:

JACK GOUGE. [SEAL.]
ERNEST GOUGE. [SEAL.]

(Acknowledgment to the Lease.)

STATE OF OKLAHOMA,
County of Hughes, ss:

Be It Remembered, That on the 22nd day of August, in the year of our Lord one thousand nine hundred and thirteen, before me, a notary public in and for said County and State, personally appeared Jack Gouge and Ernest Gouge and ——— to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

In witness whereof I have hereunto set my official signature and affixed my notarial seal the day and year first above written.

[SEAL.]

ROBERT McRAY,
Notary Public.

My commission expires 2/17/16.

In the District Court of the United States Within and for the Eastern
District of Oklahoma.

No. 2017. In Equity.

UNITED STATES OF AMERICA, Complainant,

v.

BESSIE WILDCAT et al., Defendants.

J. W. McNeal and L. W. Baxter, citizens and residents of the City of Tulsa, in the Eastern District of the State of Oklahoma, respectfully pray that they be allowed to intervene in the above entitled cause and set up their right, title and interest in and to the northwest quarter of section nine, township 18 north, range 7 east and to the oil and gas rights in said land against all the parties, both complainant, defendants and cross-complainants, and respectfully represent to the court that they are entitled to three-fourths of the oil and gas that has so far been taken and that is being taken or that which in the future may be taken from said quarter section of land; that they have rights under leases made in 1914 before the filing of case No. 2017 in equity, and that those leases have been kept alive and the interests thereunder assigned to these intervening petitioners, and they
184 herewith present their intervening petition showing the facts of such their claim, right and interest, and pray that they be allowed to file the same in this cause as intervening petitioners.

J. W. MCNEAL,
L. W. BAXTER,
By HORACE SPEED,
Their Attorney.

Endorsed: Filed in Open Court Sep. 7, 1915. R. P. Harrison,
Clerk U. S. District Court, Eastern District of Oklahoma.

In the United States Court for the Eastern District of Oklahoma.

No. 2017-E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Supplemental Præcipe for Transcript.

To the Clerk of the above named Court:

You will please incorporate into the transcript of record on the appeal taken by the complainant, the United States of America, in the case of the United States of America, complainant, v. Bessie

Wildcat, a minor, et al., defendants, No. 2017-E., the following portions of the record in addition to these set forth in the original præcipe, to-wit:

1. Suggestion of the death of the appellee, Max H. Cohn, and voluntary revivor.
2. Order of revivor in re death of Max H. Cohn.

D. H. LINEBAUGH,
United States Attorney.

W. P. Z. GERMAN,
Special Assistant to the United States Attorney.

In the United States District Court for the Eastern District of
Oklahoma.

No. 2017-E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the supplemental præcipe of appellant indicating additional portions of the record to be incorporated in the transcript on the appeal in said cause is hereby acknowledged.

185 Dated November 2nd, 1915.

BARNEY UNUSSEE,
BARNOSSEE UNUNOSSEE,
FULHOHCHEE BARNEY,
SIAH BARNEY,
TOMMY BARNEY, AND
MOLLIE BARNEY.

By OWEN & STONE,
Their Solicitors.

Dated November 2nd, 1915.

JOHNATHAN R. POSEY,
By F. SCRUGGS, *His Solicitor.*

Dated November 2nd, 1915.

ROBERT OWEN BURTON,
NATHANIEL MACK BURTON,
LYDIA BELLE WILSON, *Nee*
BURTON;
SAMUEL L. BURTON,
MINNIE OLA EDWARDS, *Nee*
BURTON;

ABI L. MILLER, *Nee* BUR-
TON, AND

MARY ELIZA BURTON,

By BAILEY, WYAND & MOON,
Their Solicitors.

Dated November 2nd, 1915.

BESSIE WILDCAT, A MINOR;
 SANTA WATSON,
As Guardian and Guardian ad Litem for
Bessie Wildcat, a Minor;
 CINDA LOWE,
 LOUISA FIFE,
 ANNIE WILDCAT AND
 EMMA WEST,
 By GEORGE S. RAMSEY,
 EDGAR A. DE MEULES,
Their Solicitors.

Dated November 2nd, 1915.

AGGIE MARSHALL,
 PHILLIP MARSHALL,
 CELIA YAHOLA,
 TONEY CHUPKO,
 JOSEPH CHUPKO,
 JAMES C. CHUPKO,
 EDDIE LARNEY,
 POLLY YARGEE,
 SARKARYE CHUPKO,
 DICK LARNEY,
 MOSER CHUPKO,
 TOMMY CHUPKO,
 LINDA HARJO,
 MARY JONES, AND
 LOLEY COOPER,
 By RALPH P. WELCH AND
 FRANKLIN & CARY,
Their Solicitors.

Dated November 2nd, 1915.

H. B. BEELER,
 By MALCOLM E. ROSSER,
Their Solicitors.

6 Dated November 2nd, 1915.

D. L. BERRYHILL,
 CHARLES S. SMITH,
 NORA WATSON, A MINOR;
 JOHN SMITH,
 LEWIS SMITH,
 LAWRENCE SMITH,
 GUY SMITH,
 ELLA LOONEY, *Nec SMITH*;
 EDNA PIKE, *Nec SMITH*;
 PEARLE SMITH,
 WILLIS SMITH, A MINOR;
 J. S. TILLY,
Guardian of Willis Smith, a Minor;
 RANNIE SMITH,

ELIZABETH RHYNE, *Nee*
SMITH;
RASHIE C. SMITH,
MONTIE NUNN, *Nee* SMITH, AND
LOU SMITH,
By J. B. FURRY,
E. C. MOTTER,
Their Solicitors.

In the United States District Court for the Eastern District of
Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the supplemental præcipe of appellant indicating additional portions of the record to be incorporated in the transcript on the appeal in said cause is hereby acknowledged.

Dated November 2, 1915.

HASKELL B. TALLEY,
*Solicitors for Jack Gouge, Ernest Gouge,
Mattie Bruner, Formerly Mattie Phillips;
Jennie Phillips, Billie Phillips, and Wil-
liam McCombs & D. L. Berryhill.*

In the United States District Court for the Eastern District of
Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the supplemental præcipe of appellant indicating additional portions of the record to be incorporated in the transcript on the appeal in said cause is hereby acknowledged.

Dated November 2nd, 1915.

BELL & FELLOWS,
*Solicitors for M. M. Traves, Administrator of
the Estate of Max H. Cohn, Deceased.*

7 In the United States District Court for the Eastern District
of Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the supplemental praecipe of appellant indicating additional portions of the record to be incorporated in the manuscript on the appeal in said cause is hereby acknowledged.

Dated November 2nd, 1915.

SHERMAN, VEASEY & DAVIDSON,
*Solicitors for Charles F. Bissett, Taraway
Oil Co., a Corporation; F. L. Moore and
J. S. Cosden.*

In the United States District Court for the Eastern District of
Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the supplemental praecipe of appellant indicating additional portions of the record to be incorporated in the manuscript on the appeal in said cause is hereby acknowledged.

Dated November 2nd, 1915.

HORACE SPEED,
*Solicitors for J. W. McNeal
• and L. W. Baxter.*

In the United States District Court for the Eastern District of
Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the supplemental praecipe of appellant indicating additional portions of the record to be incorporated in the transcript on the appeal in said cause is hereby acknowledged.

Dated November 2nd, 1915.

SHEA & BLUE,

Solicitors for Howard Weber.

In the United States District Court for the Eastern District of
Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the supplemental praecipe of appellant indicating additional portions of the record to be incorporated
188 in the transcript on the appeal in said cause is hereby acknowledged.

Dated November 2nd, 1915.

ROWLAND, TALBOTT & NYCE,

Solicitors for Dave Knight.

By J. D. TALBOTT.

In the United States District Court for the Eastern District of
Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the supplemental præcipe of appellant indicating additional portions of the record to be incorporated in the transcript on the appeal in said cause is hereby acknowledged.

Dated November 3, 1915.

JOHN DEVEREUX,
Solicitor for Sabar Jackson.

*

In the United States District Court for the Eastern District of
Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the supplemental præcipe of appellant indicating additional portions of the record to be incorporated in the transcript on the appeal in said cause is hereby acknowledged.

Dated November 3, 1915.

WM. A. COLLIER,
*Solicitors for Martha Simmons
and Hannah Bullette.*

In the United States District Court for the Eastern District of
Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the supplemental praecipe of appellant indicating additional portions of the record to be incorporated in the transcript on the appeal in said cause is hereby acknowledged.

Dated November 10th, 1915.

E. J. VAN COURT &
HAZEN GREEN,

*Solicitor for Jack Gouge, Ernest Gouge, Mattie
Bruner, Jennie Phillips, Billie Phillips and
William McCombs.*

189 In the United States District Court for the Eastern District
of Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the supplemental praecipe of appellant indicating additional portions of the record to be incorporated in the transcript on the appeal in said cause is hereby acknowledged.

Dated November 10th, 1915.

W. A. LEDBETTER,

*Solicitor for Anna Messenger,
Yetta Cohn and Isadore Cohn.*

In the United States District Court for the Eastern District of
Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the supplemental præcipe of appellant indicating additional portions of the record to be incorporated in the transcript on the appeal in said cause is hereby acknowledged.

Dated November 10, 1915.

STUART, CRUCE & CRUCE,
Solicitors for Black Panther Oil & Gas Co.

In the United States District Court for the Eastern District of
Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Acknowledgment of Service.

Service of a copy of the supplemental præcipe of appellant indicating additional portions of the record to be incorporated in the transcript on the appeal in said cause is hereby acknowledged.

Dated November 13th, 1915.

J. COODY JOHNSON,
*Solicitor for Martha Jackson, a Minor; Saber
Jackson, as Guardian, and Guardian ad
Litem and Next Friend of Martha Jackson,
a Minor, and J. Coody Johnson.*

Endorsed: Filed Nov. 16, 1915. R. P. Harrison, Clerk. U. S.
District Court, Eastern District of Oklahoma.

190 In the United States Court for the Eastern District of
Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT et al., Appellees.

Order.

Now on this the 15th day of November, 1915, the above entitled and numbered cause came on to be heard upon the suggestion of the death of the appellee, Max H. Cohn, by his heirs, and their voluntary appearance and prayer that the cause be revived in their names, and upon consideration thereof it is ordered that said cause be and the same is hereby revived in the names of Anna Messenger Yetta Cohn and Isadore Cohn, as the heirs of Max H. Cohn, deceased, and they are made parties in the place of the said Max H. Cohn.

RALPH E. CAMPBELL, *Judge.*

Endorsed: Filed In Open Court, Nov. 15, 1915. R. P. Harrison
Clerk U. S. District Court, Eastern District of Oklahoma.

In the United States District Court for the Eastern District of
Oklahoma.

No. 2017. E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT, a Minor, et al., Appellees.

Voluntary Revivor.

Come now Mrs. Anna Messenger, Mrs. Yetta Cohn and Isadore Cohn, and show to the court that the defendant Max H. Cohn departed this life on September 21, 1915, in the State of Oklahoma and that he left surviving him no children or other descendants and no father or mother, but left as his sole and only heirs at law said Anna Messenger and Yetta Cohen, his sisters, and Isadore Cohn, his brother, the first two of whom reside at Portsmouth Virginia, and the last of whom resides at Goldsboro, North Carolina.

The said heirs of said Max H. Cohn, deceased, do hereby voluntarily enter their appearance in the above entitled cause as defend

ants and appellees in the place of the said Max H. Cohn, praying the court to enter an order reviving said cause in their names.

ANNA MESSENGER,
YETTA COHN—COHN AND
ISADORE COHN,

By W. A. LEDBETTER,
Their Solicitor.

Endorsed: Filed Nov. 15, 1915. R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

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(Copy.)

In the District Court of the United States for the Eastern District of Oklahoma.

No. 2017-E.

UNITED STATES OF AMERICA, Appellant,

v.

BESSIE WILDCAT et al., Appellees.

Order.

On this the 15th day of November, 1915, the above entitled cause came on to be heard upon the application of the appellant, the United States of America, by its solicitors, for an order enlarging the time within which the transcript of record may be filed in the United States Circuit Court of Appeals for the Eighth Circuit at St. Louis, and upon consideration of said application, being well and sufficiently advised in the premises, I find that good cause exists for the enlargement of said time.

It is, therefore, considered and ordered that the appellant in the above entitled action may have until December 22, 1915, within which to docket this case and file record on appeal in said cause in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

RALPH E. CAMPBELL,
*United States District Judge for the
Eastern District of Oklahoma.*

Certificate of Clerk.

UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:.

I, R. P. Harrison, clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above

and foregoing is a full, true and correct transcript of so much of the record in the case of United States of America v. Bessie Wildcat, et al., No. 2017 Equity, as was ordered by precepts of counsel herein to be prepared and authenticated, as the same appears from the records in my office.

I do further certify that the original Citation issued in this case is hereto attached and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court at my office, in the City of Muskogee, this 18th day of December, A. D. 1915.

[SEAL.]

R. P. HARRISON, *Clerk*,
By H. E. BOUDINOT, *Deputy*.

192 And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(Appearance of Counsel for Appellant.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 4624.

UNITED STATES OF AMERICA, Appellant,

vs.

BESSIE WILDCAT et al.

The Clerk will enter my appearance as counsel for the Appellant.

D. H. LINEBAUGH,
U. S. Attorney.

W. P. Z. GERMAN,
Sp. Ass't U. S. Att'y.

PAUL PINSON,
Sp. Ass't U. S. Att'y.

A. A. DAVIDSON.

(Endorsed:.) Filed in U. S. Circuit Court of Appeals on May 18, 1916.

(Order of Argument, etc.)

May Term, 1916.

TUESDAY, May 16, 1916.

This cause having been called for hearing in its regular order, it is now here ordered, upon the joint application of counsel for all parties, that the time for oral argument of this cause be, and is hereby, extended to two hours for each of the parties, and leave is also granted to three counsel to participate in the oral argument on

behalf of appellees, thereupon, argument was commenced by Mr. A. A. Davidson for appellant, and the hour for adjournment having arrived further argument is now postponed until tomorrow.

193

(Order of Submission.)

May Term, 1916.

WEDNESDAY, May 17, 1916.

This cause having been called for further hearing, argument was resumed by Mr. A. A. Davidson for appellant, continued by Mr. Joseph C. Stone, Mr. J. J. Shea and Mr. C. B. Stuart for the appellees and concluded by Mr. W. P. Z. German for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

(Order to File, Enter of Record and to Transmit Certificate of Questions to Supreme Court of the United States.)

United States Circuit Court of Appeals, Eighth Circuit.

September Term, 1916.

FRIDAY, October 20, 1916.

No. 4624.

UNITED STATES, Appellant,

vs.

BESSIE WILDCAT et al.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

In the above entitled cause certain questions having arisen on the record, upon which this court desires the instruction of the Supreme Court of the United States as provided by law, and a certificate of such questions having been prepared and duly signed, it is now here ordered by this Court that such certificate be filed and entered of record in this court, and that the original of said certificate be duly certified by the Clerk of this Court and that it be by him duly transmitted to the Supreme Court of the United States for its action thereon.

October 20, 1916.

194 *(Certificate of Questions to the Supreme Court of the United States.)*

United States Circuit Court of Appeals, Eighth Circuit.

September Term, A. D. 1916.

No. 4624.

UNITED STATES OF AMERICA, Appellant,

vs.

BESSIE WILDCAT, a Minor; SANTA WATSON, as Guardian of Bessie Wildcat, a Minor; Cinda Lowe, Louisa Fife, Annie Wildcat, Emma West, Martha Jackson, a Minor; Saber Jackson, as Guardian and Next Friend of Martha Jackson, a Minor; J. Coody Johnson, Aggie Marshall, Philip Marshall, H. B. Beeler, Max H. Cohn, Black Panther Oil & Gas Company, a Corporation; Jack Gouge, Ernest Gouge, Mattie Bruner, formerly Mattie Phillips; Jennie Phillips, Billie Phillips, D. L. Berryhill, William McCombs, Barney Unussee, Barnossee Unussee, Johnathan R. Posey, Charles F. Bissett, Taxaway Oil Company, a Corporation; F. L. Moore; J. S. Cosden; Fulhokee Barney, Siah Barney, Tommy Marney, Mollie Barney, Toney Chupko, Joseph Chupko, James C. Chupko, Eddie Larney, Polly Yargee, Sarkarye Chupko, Dick Larney, Moser Chupko, Tommy Chupko, Linda Harjo, Mary Jones, Loley Cooper, Celia Yahola, Charles S. Smith, Nora Watson, a Minor; John Smith, Lewis Smith, Guy Smith, Ella Looney, née Smith; Edna Pike, née Smith; Pearle Smith, Willis Smith, a Minor; J. S. Tilly, Guardian of Willis Smith, a Minor; Rannie Smith, Elizabeth Rhyne, née Smith; Pashie C. Smith, Montie Nunn, née Smith; Lous Smith, Howard Weber, Saber Jackson, Martha Simmons, Hannah Bullette, Robert Owen Burton, Nathaniel Mack Burton, Lydia Belle Wilson, née Burton; Abi L. Miller, née Burton; Ola Edwards, née Burton; Mary Eliza Burton, J. W. McNeal, L. W. Baxter and Dave Knight, Appellees.

195 *Questions and Statement of Facts Certified to the Supreme Court of the United States.*

This cause came duly to this Court upon appeal from the District Court of the United States for the Eastern District of Oklahoma, and was argued before the undersigned judges, and submitted. It involves three questions of law concerning which the members of this court desire the instruction of the Supreme Court of the United States for their proper decision. Said questions, together with the facts on which they arise, are set forth in the following statement, and the same are hereby certified by this Court to the Supreme Court for its instruction.

This is a suit in equity brought by the United States on behalf of

Creek Nation against the heirs of Barney Thlocco, a full-blood Indian, to obtain cancellation of the allotment certificate and for his allotment of 160 acres. The defendants, Posey, Bassett, away Oil Co., Moore and Costain, claim an interest in five acres of the same property under a subsequent allotment. They intervene and ask the same relief as the United States. They will, therefore, require no further notice. All the other defendants claim as heirs of Thlocco. No right is asserted as a bona fide purchaser or encumbrancer on behalf of any of them.

Section 28 of the Original Creek Agreement, (31 Stat. at Large, 869), provides for the enrollment of all citizens of the nation who are living on the first day of April, 1899. Citizens who died prior to that date lost their right of enrollment, and to share in the tribal estate. The bill of complaint rests the right of the government to grant relief upon three grounds:

1. That Thlocco died prior to April 1st, 1899, to-wit, in the month of January of that year.

2. That the Dawes Commission, in entering his name upon the tribal roll, and in causing the land in question to be conveyed to him, acted under a gross mistake of fact and law, and also acted arbitrarily, and wholly without evidence as to whether Thlocco was living April 1, 1899. No charge of fraud is made.

3. That the certificate of allotment and deeds to Thlocco were made to a dead man, and were for that reason null and void.

The answer avers that Thlocco was living April 1, 1899. It denies that the Commission acted arbitrarily and without evidence in placing his name upon the roll, and allotting the lands to him, and alleges that the Commission, in causing both those acts to be done, is not guilty of any mistake of fact or of law, but acted upon evidence satisfactory to it, and sufficient in law and in fact. It further alleges that the Dawes Commission was vested with jurisdiction to determine what persons were entitled to enrollment as citizens of the nation, and entitled to allotment out of the tribal lands, and that its decision in that regard having been approved by the Secretary of the Interior, "said enrollment allotment and patent cannot be cancelled, nor can the issue of fact upon which the Commission placed the name of Barney Thlocco upon the approved Creek Roll be tried again; and these defendants say that this court is without authority of law to reopen or retry the question of fact sought to be put in issue by the United States." The answer admits that Thlocco died prior to the issuance of his allotment certificate, June 30, 1902.

Upon the trial of the case the government offered to show by numerous witnesses, and by circumstances of persuasive force, that Thlocco in fact died in the Month of January, 1899, of smallpox. Objection was made to this evidence by the defendants, and the objection was sustained and exception saved by the government. The trial court thus ruled upon the ground that the question whether Thlocco was living on April 1st, 1899, was one of the questions which the law submitted to the Dawes Commission, and that its decision, by placing Thlocco's name upon the tribal roll, could

only be attacked upon the ground of fraud, error of law, or gross mistake of fact, or upon the ground that the Commission acted arbitrarily and wholly without evidence; that it was not open to the government for the purpose of attacking the allotment certificate and deeds to Thlocco, to retry the question of fact as to whether he was living April 1st, 1899.

Thlocco's enrollment was approved by the Secretary of the Interior March 23, 1902. His allotment certificate was made June 30, 1902. The deeds for his homestead and surplus lands were executed March 11, 1902, approved by the Secretary of the Interior

197 April 3rd of that year, and filed for record April 11. They were never delivered. On the contrary, as will be presently explained, the attention of the Commission was drawn to the fact that Thlocco had died prior to April 1st, 1899. Thereupon the deeds were recalled from the Principal Chief, and have since remained in the custody of the Commission. The Government, in further support of its bill, offered to show by a certified copy of the record and evidence, that on August 25, 1904, the attorney of the Creek Nation presented to the Commission a motion to reopen the enrollment of Barney Thlocco upon the ground that he died prior to April 1st, 1899, supporting the same by sworn affidavits of two witnesses; that this motion was entertained by the Commission, which recommended to the Secretary of the Interior that Thlocco's enrollment be re-examined. That September 16, 1904, the Secretary of the Interior directed a rehearing before the Commission. That such rehearing was had, at which time evidence in support of the motion was received. That as the result of such hearing the Commission, on October 10, 1906, recommended to the Secretary of the Interior "that authority be granted for the striking of the name of said applicant (Thlocco) from the approved roll of citizens of the Creek Nation," and that on December 3, 1906, the Secretary of the Interior approved this recommendation, and directed the Commission to cancel Thlocco's name from the tribal roll, and further stated in the decision that the Attorney General had been requested to take such action as he may deem proper looking to the setting aside of the deeds here involved. That the enrollment was in fact cancelled, pursuant to the decision. Objection was made to this evidence by the defendants, and sustained by the court, upon the same grounds as were stated in support of the ruling in respect to the oral evidence relating to the date of Thlocco's death, and an exception saved on behalf of the government.

The trial then proceeded. The trial court restricted the government to showing that the Dawes Commission acted in Thlocco's case wholly without evidence. This ruling foredoomed the government to defeat, because the information, if any, upon which the Commission acted was oral. No record or memorandum of it was ever preserved. The enrollment and allotment were both arbitrary in the sense that they were made without petition, and wholly on the initiative of the Commission; and, owing to the many thousands of identical cases which came before the Commission and its clerical force, no person who had to do with Thlocco's

enrollment or allotment had any present recollection as to what, if any, information was received. At the conclusion of the case the government renewed its offer of proof, to which objections were sustained upon the grounds above stated. A decree was then entered dismissing the bill for the reason that the government had failed to show that the commission in enrolling Thlocco acted arbitrarily and without evidence. To review that decree the government sued out his appeal.

The rulings as to the admissibility of evidence present the question as to the force to be given to the decisions of the Dawes Commission. To understand that a review of the procedure of the Commission is necessary. In stating this we have consulted its Annual Reports as well as the evidence contained in the transcript.

It has been several times stated in judicial opinions that the Dawes Commission was a special tribunal created by law and vested with jurisdiction to determine the right to citizenship in the Five Civilized Tribes, and the share of each citizen in the tribal property. Those statements convey the idea that the entire Dawes Commission sat as a court to hear evidence pro and con, and pronounce judgment as to the rights of each citizen of the tribes. Such, however, is not the fact. It was only in the most important affairs of the tribes, involving litigated contests, and affecting large groups of Indians, that the Commission sat as a tribunal. They were engaged in a great governmental enterprise involving the rights of citizens in five nations, and the valuation of lands and improvements in a territory as large as the State of Indiana. Their time was absorbed in drafting laws and negotiating agreements with the tribes, in acting as an intermediary between them and the government at Washington, and in organizing the clerical and administrative forces necessary to carry out this great enterprise. The Commission, as a whole, could not deal with the rights of an individual citizen except in those cases in which he represented a larger group. Many of these important subordinate questions, even in litigated matters, were heard before individual commissioners. When we descend to the rights

of the individual Indian to enrollment, the selection of his allotment, its valuation and classification, those investigations were mainly carried on by the large clerical force employed by the Commission. For each tribe this force was divided into three groups: The Enrollment Division, the Classification and Valuation Division, and the Allotment Division. All of these, of course, were under the supervision of the Commission who formulated their procedure and supervised their work. As a general rule the hearing of the statements of Indians, the gathering of information by inquiries, and by so-called "field parties," as to the right to enrollment, and the right to the allotment selected by the individual Indians, were left to this clerical force. By the rules of the Commission, every adult Indian was required to present himself in person to the Commission, and apply for enrollment of himself and his minor children. The clerical force heard his statements, examined him to discover the information required, and, when necessary prosecuted the inquiry by calling others and hearing their statements on the subject. They

acted in a purely administrative way. As a rule the statements were not given under oath. If the information seemed doubtful, inquiries were made of town officers and of neighbors, when those neighbors presented themselves for enrollment. In other cases a field party, consisting of a group of clerks, was sent out into the Indian neighborhood or township, and hearings were had there on the ground. As already stated, all investigations were conducted in a purely administrative way. Anything that would give information was received, without regard to the rules of evidence which obtain in more formal tribunals. The enrollment was made by means of so-called census cards. These were devised by the Commission to present in the briefest possible form the data required by the law and the rules of the Commission. Each Indian was given a separate card, and a separate number, and the cards were arranged on the principle of a card index so as to be readily accessible. Upon each card was entered the data as it was obtained. Sometimes the card was made out complete, upon the application of the Indian for enrollment, and at other times it required prolonged investigations. When a block of these cards had been completed, the clerks of the enrolling division would present them to the Commissioner in charge, and go over them with him, and make a report of the information received. If the information was found to be sufficient, the cards were approved by the Commissioner. If the information was found to be insufficient the investigation was prosecuted further until such information had been gleaned as met with the approval of the commissioner in charge. No record of the information was kept except in contested cases. When the cards were approved they were passed on to be entered in the final rolls. These final rolls were simply a transcript of the approved cards made upon similar cards. They were made out in quadruplicate, one for the Commission, one for the Indian Nation, one for the Commissioner of Indian Affairs, and one for the Secretary of the Interior. To expedite the work of enrollment when a schedule of about 500 names had been gathered and approved, the final roll was made up for those names, and certified by the chairman of the Commission, without waiting for a complete roll of the tribe. It was then sent to the Secretary of the Interior for his approval, and upon being approved, became a part of the final roll of the nation. In nearly all cases, the approval of the Secretary must have been perfunctory. He had before him nothing but the cards themselves. Except in contested cases, no evidence was transmitted by the Commission. There was, therefore, before the Secretary nothing upon which he could exercise judicial or quasi-judicial judgment by way of reviewing the action of the Commission.

The full-blood Indians took strong ground against the Dawes Commission and its plan for the allotment of the tribal lands. This was especially true in the Creek and Cherokee Nations. The full-bloods of those tribes had been steadily pressed back to the extreme western part of the Territory by the fraudulent appropriation of the better lands to the east. There they dwelt in a state of primitive

savagery as compared with the balance of the tribe. Many of them resisted all efforts of the Dawes Commission to persuade or force them to appear for enrollment or for the selection of allotments. This resistance was organized and permanent. At one time it assumed the form of what is known in the evidence in this case, and in the reports of the Commission, as the "Snake Indian Uprising." This antagonism was promoted by head men of the townships in which these full-bloods lived. The reports of the Commission for 1904 and 1905 show that it continued until after the work of enrollment and allotment for the Creek Nation was completed.

201 This resistance of the full-bloods presented an unexpected difficulty. To have allotted and disposed of the tribal lands without making provision for them would have left them on the hands of the government destitute, discontented and belligerent. The government had no other public lands to which they could have been removed and permitted to live in tribal state. Not to provide for them would have doomed the entire enterprise to failure.

To meet this difficulty the Commission was compelled to resort to arbitrary methods. Section 21 of the Curtis Act empowered the Commission "to require all citizens of said tribes, and persons who should be so enrolled, to appear before said Commission for enrollment at such times and places as may be fixed by said Commission." The rules of the Commission required all adult Indians to appear in person before them for enrollment, but, acting upon the analogy of the section in regard to the selection of allotments, permitted the head of the family to enroll minor children. Section 4 of the Original Creek Agreement, by express provision, permitted selections of allotments for minors to be made by the head of the family, or by their guardian. Thus, by implication, it forbade the selection of allotments for adults to be made otherwise than by the citizen in person. This inference is strengthened by the clause in Section 2 of the same agreement, authorizing allotments of 160 acres to each citizen, "which may be selected by him so as to include improvements." In the case of the obstinate full-bloods the Indians refused to appear before the Commission or to give information. As to them, therefore, the rules of the Commission and the statutes requiring their personal appearance were disregarded both as to enrollment and allotment. The Commission itself, acting without any personal appearance of the Indian, but upon such information as it could obtain from the tribal rolls, and by administrative inquiries, entered the names of those obdurate full-bloods upon the final roll, and made to them, without any personal application on their part, and by what is known in the reports of the Commission as "arbitrary" selections, allotments of land. In the Creek Nation, down to the report for 1904, there were 3261 of such "arbitrary" allotments, out of a total enrollment of 15,359.

202 Section 28 of the Original Creek Agreement aggravated this situation as to enrollment. It provided as follows:

"No person, except as herein provided, shall be added to the rolls of citizenship of said tribe, after the date of this agreement, and no

person whomsoever shall be added to said rolls after the ratification of this agreement."

The agreement was ratified May 25, 1901. The tribe assembled at Okmulgee, its capital, some days before that date, for the purpose of considering and acting upon the agreement. For weeks the chiefs of the tribe and the Dawes Commission had been keenly solicitous as to the fate of the full-blood members who had not yet been enrolled. At the date of the Okmulgee meeting there were between three and four thousand of such citizens whose names appeared on the tribal rolls, and who had not been entered on new census cards for enrollment. About two weeks prior to May 25, a member of the Dawes Commission, with a force of clerks, went to Okmulgee where the Indians were in session, with two objects in view: First to induce the Indians to ratify the Original Creek Agreement; second, to complete the enrollment of the tribe. The report and the evidence in the present case show the efforts made by the Commission to bring in the full-bloods for enrollment before the ratification of the agreement, and the refusal of the chiefs of the tribe to act on it until these members had been enrolled. Neither the evidence on the trial of the present case, nor the report of the commission, gives any definite statistics as to the success of these efforts. It is, however, clearly shown that after all efforts had been exhausted there were a large number of names upon the tribal rolls that had not been accounted for, and that the representatives of the nation refused, on the face of Section 28 of the Agreement, to ratify it until some provision should be made that would prevent these citizens from being deprived of their tribal rights. To meet that difficulty the members of the Commission in charge decided to list upon new census cards all names appearing upon the tribal rolls of 1890 and 1895 of those who had not already been enrolled. During the last two or three days the clerks were busy transferring those names to the new census cards, working until late into the night. It was considered that this would be the beginning of the enrollment of those citizens, and would thus be sufficient to satisfy the requirements of Section 28.

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Turning now to Thlocco's enrollment: He was one of the "unaccounted for" full-bloods. His card was made out at Okmulgee on the 24th day of May, 1901, the last day before the ratification of the agreement, and while this work of entering names upon the new census cards was going on, as above described, to meet the requirements of Section 28. His name was not only on the tribal rolls, but the Commission also had for him an "old census" card which was prepared while the Commission was taking the census under the act of June 10, 1896. This was made out between October 15, 1897, and December 25, 1897. It contained the description of matter needed to complete Thlocco's new census card. Thlocco's new census card was, therefore, made out on the 24th day of May, 1901, complete as it appears in the final rolls approved by the Secretary of the Interior. The new card shows that the clerk who made it out gave before him some information in addition to that contained in the tribal rolls, and the old census card, for the postoffice and age

Thlocco are stated differently in the new card from the old. No person appeared to request Thlocco's enrollment. None of the clerks or the commissioner who was present had any present recollection in regard to the enrollment. None of his heirs appeared to request his enrollment upon the ground that he had died subsequent to April 1, 1899. This is the manner in which Thlocco's name was listed for enrollment, and his census card made out. That card being complete, his name would, in the regular practice of the Commission, be transcribed to the final rolls, unless some reason was brought to the notice of the Commission, or its clerical force, showing that the name ought not to be transferred to the final roll.

There is no evidence in the record as to what, if any, investigation was made at the time Thlocco's card was made or subsequently, to ascertain whether he was living on the first day of April, 1899. Nobody concerned in the matter of his enrollment has any recollection on that subject. There is evidence of the practice of the Commission to make inquiries and investigations to ascertain that fact as to the persons enrolled, and that no name ever was enrolled without information that was deemed satisfactory at the time; but as to what, if anything, was done in the case of Thlocco there is an entire absence of memory.

When evidence of the death of any citizen was obtained that was satisfactory, it was put in the form of an affidavit which was filed as a permanent record, and an entry made in ink on the 204 census card of the citizen, referring to this affidavit. To obtain these "proofs of death" was one of the constant searches of the Commission. Their annual reports give the statistics as to the number of proofs of death obtained during each year. Forms of affidavit for that purpose were prepared by the Commission and sent out to the clerks of court, probate judges and sheriffs, and were also placed in the hands of field parties, and whenever any person was discovered who had sufficient information to make affidavit to the fact and time of the death of a citizen, the affidavit was taken and sent in to the Commission as a permanent record. In the case of Thlocco no such affidavit was ever obtained. On the contrary, the evidence is conclusive that the Commission throughout its dealing with his name, from the time of his enrollment down to the time of the issuing and recording of his deeds, believed him to be alive. We say this because the certificate of allotment and the deeds of allotment are made out to Thlocco in person, instead of being made out to his heirs. It was the uniform practice of the Commission to make certificates and deeds of allotment to the heirs of a citizen who was known to have died subsequent to April 1st, 1899, and not to the citizen himself. Official forms of such deeds were prepared by the Commission. The number of deeds "to heirs" are specified in the annual reports. Down to 1904 they amounted to 1251 in the Creek Nation. The uniformity of this practice is further shown by the following entry in the report for 1906, at page 64:

"Prior to the act of April 26, 1906, it was necessary that deeds covering the lands of deceased allottees be issued to the heirs of the deceased; and in cases where deeds had been issued before evidence

of death was received, it was necessary to recall them and issue new deeds to their heirs. For this reason 220 deeds were cancelled during the past year, and new deeds to the heirs of deceased allottees issued in their stead."

The Dawes Commission did not treat the rolls as final after their approval. Fourteen hundred and forty-seven names were cancelled from the final rolls of the Choctaw and Chickasaw nation after their approval by the Secretary. This was done because these persons, after their final enrollment, were discovered to have died prior to the date fixed by the statute. Three hundred and fifty names were stricken from the Cherokee roll at one time for the same reason. Many names were cancelled from the Creek roll upon the same ground. Two years after Thlocco's enrollment was approved, when the facts touching his enrollment must have been comparatively fresh in the mind of the Commission and its clerical force, application to cancel his enrollment upon the ground that he died prior to April 1st, 1899, was entertained, and upon a subsequent hearing the enrollment was cancelled for that reason.

The property here involved at the time of the allotment was of small value; but, owing to the discovery of oil upon it, its value now, as stated in the argument of the case, is several million dollars.

The questions of law involved in the case concerning which the members of this Court desire the instruction of the Supreme Court of the United States for their proper decision, are:

1. Should the evidence offered by the government to show that Thlocco died prior to April 1st, 1899, have been admitted?
2. Should the evidence offered by the government to show that Thlocco's enrollment was cancelled by the Dawes Commission, have been admitted?
3. Were the certificate of enrollment and deeds to Thlocco null and void because he was dead at the time they were made?

Questions one and two involve no question of pleading or the competency or relevancy, as proof, of the evidence offered. They involve rather a question of substantive law, and go to the right of the government to show the facts offered to be proved as a basis for the relief asked in the bill.

WILLIAM C. HOOK,
Circuit Judge.
WALTER I. SMITH,
Circuit Judge.
CHARLES F. AMIDON,
District Judge.

Attest:

[SEAL.] JOHN D. JORDAN, *Clerk.*

206 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the above named Court, do hereby certify that the foregoing certificate in the case of United States of America, Appellant, vs. Bessie Wildcat, a Minor, etc., et al., No. 4624, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Paul, Minnesota, this twentieth day of October, A. D. 1916.

[SEAL.] (Signed) JOHN D. JORDAN,
Clerk of the United States Circuit Court of
Appeals for the Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Oct. 20, 1916.

(Præcipe by Appellees for Transcript for Supreme Court.)

To the Clerk of the above named Court:

Prepare and certify in the above entitled cause the whole of the record in form to be filed in the Supreme Court of the United States with an application to said Supreme Court that the whole record and cause may be sent up to it for its consideration, as provided for by Supreme Court Rule 37.

JOSEPH C. STONE,
Muskogee, Okla.,
Attorney for Appellees.

(Endorsed:) Filed in U. S. Circuit — of Appeals on Nov. 27, 1916.

207 *(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma as prepared, printed and certified by the Clerk of said District Court to the United States Circuit Court of Appeals in pursuance of the Act of Congress, approved February 13, 1911, and full, true and complete copies of all the pleadings, record entries and proceedings, including the

opinion, had and filed in the United States Circuit Court of Appeals except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared pursuant to the precept by appellees, in a certain cause in said Circuit Court of Appeals wherein the United States of America is Appellant, and Bessie Wildcat, a Minor, et al., are Appellees, No. 4624, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this second day of December, A. D. 1916.

[Seal] United States Circuit Court of Appeals, Eighth
Circuit.]

JOHN D. JORDAN,

Clerk of the United States Circuit Court of Appeals.



RECEIVED
JAN 10 1964
U.S. DEPT. OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

MEMORANDUM FOR THE DIRECTOR, FBI

SUBJECT: [Illegible]

TO: [Illegible]

FROM: [Illegible]

DATE: [Illegible]

RE: [Illegible]

1. [Illegible]

Very truly yours,
[Illegible Signature]
[Illegible Title]

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1916.

No. 741.

THE UNITED STATES

vs.

BESSIE WILDCAT, A MINOR, ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT.

**BRIEF AMICUS CURIAE ON BEHALF OF THE CREEK
NATION.**

Preliminary Statement.

May it please the court:

The statement of this case by the United States Circuit Court of Appeals for the Eighth Circuit in certifying the three questions of law involved in the case, concerning which the members of that court have requested the instruction of this court for their proper decision, is so clear, concise, fair, and impartial, that counsel for the Creek Nation will not undertake to make a further statement of the facts herein, except as it may be necessary in connection with the discussion of the various propositions of law involved.

ARGUMENT AND BRIEF.

The first and second questions certified to this court are

1st. Should the evidence offered by the Government to show that Thlocco died prior to April 1, 1899, have been admitted?

2d. Should the evidence offered by the Government to show that Thlocco's enrollment was cancelled by the Dawes Commission have been admitted?

The learned solicitor general has filed an able and exhaustive brief in which, it seems to counsel, reason and the authorities are overwhelmingly in favor of the contention he makes, and compels an affirmative answer to these questions. We will, therefore, for the present, pass to the third question.

3d. Were the certificates of allotment and deeds to Thlocco null and void because he was dead at the time they were made?

The above and foregoing was the third question certified by the Court of Appeals to the Supreme Court for instructions as to its proper decision.

On the trial of the case in the District Court, the Government offered to prove that Thlocco died in the latter part of January, 1899. To the introduction of this testimony the defendants objected. The court sustained the objection and denied the Government the right to make proof of the facts recited in the offer (Tr., pp. 64, 65, 66, 111, and 112). The action of the court in so ruling is assigned as error (Assignments of error XXI, XXII, Tr., pp. 126, 127, and 128).

The name of Barney Thlocco appears on the approved roll of the Creek Nation opposite roll No. 8592, on card No. 3021, field No. 3456. The census card shows that this name

was listed for enrollment May 24, 1901, and that the enrollment thereof was approved by the Secretary of the Interior May 28, 1902.

On June 30, 1902, the Dawes Commission, acting upon the resolution of the Commission adopted May 24, 1902 (Tr., pp. 45 and 46), issued a certificate of allotment in the name of Barney Thlocco, setting apart to him the northwest quarter (N. W. $\frac{1}{4}$) of section nine (9), township eighteen (18) north, range seven (7) east, containing one hundred and sixty (160) acres, and, from this one hundred and sixty (160) acre tract, setting apart the southeast quarter (S. E. $\frac{1}{4}$) of the northwest quarter (N. W. $\frac{1}{4}$) as his homestead.

Homestead and allotment deeds, duly executed by the Principal Chief of the Creek Nation, dated March 11, 1903, and approved by the Secretary of the Interior April 3, 1903, were issued in the name of Barney Thlocco conveying the land described in the certificate.

These deeds were filed for record in the office of the Commission and were then handed to the Principal Chief of the Creek Nation for delivery, but a question having subsequently arisen as to whether or not Barney Thlocco was entitled to allotment, the Commission recalled the deeds from the possession of the chief and placed them on file in its office where they have since remained, and now remain. There has, therefore, never been any actual delivery of the deeds to any person whomsoever.

The Government offered to show that, upon motion filed by the attorney for the Creek Nation, the enrollment of the name of Barney Thlocco was reopened, by the Commission for further hearing and consideration, at the direction of the Secretary of the Interior; that, at the hearing before the Commission, evidence was offered for the purpose of showing that Barney Thlocco died prior to April 1, 1899, and that the Commission thereupon recommended that it be given authority, by the Secretary of the Interior, to strike

the name from the approved roll; that the Secretary approved the recommendation of the Commission in that respect, and pursuant thereto the enrollment of the name of Barney Thlocco was cancelled. To this offer the defendants interposed an objection which the court sustained (Tr., pp. 51-62).

The name of Barney Thlocco was listed for enrollment by a field party at the town of Okmulgee. No application for the enrollment was presented to the Commission, nor does it appear upon what evidence, if any, the enrollment was made.

By the act of March 1, 1901, it is provided:

"All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

This section provides for an allotment to a *living* citizen and to the *heirs* of one who had been a citizen. Nowhere in the acts of Congress relating to the Five Civilized Tribes can be found provision for an allotment to a *deceased citizen*. The provision is for the allotment and distribution to the *heirs* of the deceased citizen. Presumably the act was so worded in recognition of the rule that the title to real estate must rest in some living person. If the deed fails of a grantee *in being*, no title is thereby conveyed.

In Tiffany on Real Property (Ed., 1903) section 380, it is said:

"A conveyance to a deceased person is invalid, but a conveyance to the heirs of one deceased is sufficient, since their identity can be determined."

In Jones on the Law of Real Property, section 223, it is said:

"The grantee must be in existence and capable of taking at the time of the grant. This was essential at common law because otherwise there could be no livery of seisin. A grantee is as necessary to the validity of a grant as that there should be grantor or a thing granted. Thus a conveyance to such children as may afterwards be born to persons named, is inoperative and vests no title in after-born children of such persons. A deed to a person not living at the time of its execution and his heirs, is void, there being no person to take under it as the word 'heirs' is a word of limitation and not of purchase; but a deed to a person named or his heirs, is not void, for it is a conveyance to such person, if living, and if he is not living, to his heirs. It is a deed in the alternative. A deed to the heirs of a person deceased is valid because the person entitled to take can be ascertained by parole evidence."

That delivery is essential to the validity of patents was held by Mr. F. L. Campbell, in an opinion prepared for the Secretary of the Interior, dated August 20, 1903 (File I. T. D. 5908-1903), when Assistant Attorney General for the Department of the Interior, as follows:

"The proper practice in conveying allotted lands where the allottee has died prior to conveyance, in my opinion, is to make the deed run to 'the heirs of' the allottee, naming the decedent. A patent or grant to a deceased person is void at law."

Citing in support thereof the cases of *Galloway vs. Findley* (12 Pet., 264-298), *Davenport vs. Lamb* (13 Wall.,

418-427), *McCrackens' Heirs vs. Beall* (3 A. K. Marsh, Kv., 210), *Hunter vs. Watson* (12 Cal., 363-73, Am. Dec., 543).

Under this construction of the law deeds theretofore issued to deceased persons were cancelled and new deeds issued to the heirs. (See opinion of Assistant Attorney General, dated August 20, 1903, Appendix. Letter from the Dawes Commission, transmitting names of 484 persons, appendix.)

In the Creek allotment contest case of *Major vs. Thompson*, decided by the Secretary of the Interior in an opinion rendered February 18, 1904 (I. T. D., 6752, 1903), found on page 193 of the report of the Commission for the year ending June 30, 1904, the Secretary said:

"The acceptance of the deed has the effect of the execution and delivery of a deed of release of the allottee's interest in the other communal lands allotted to others of the tribe, like the voluntary deed in partition of one of several common owners. This makes acceptance of the deed a part of the transaction of partition or allotment of the communal property in severalty to the individual members of the communal owners. Such deed is therefore not the equivalent of a patent by the United States to public lands. The individual entryman has no interest in the mass of public lands, and has nothing therein to release. At or before the time of the final entry he renders the full consideration of the land he seeks to acquire, and his assent to the passing of legal title to him is completed at the instant of the final entry. The patent when issued relates to that date, though issued long afterwards. The issue and record of the patent vest legal title, whether it is delivered or not (*United States vs. Schurz*, 102 U. S., 378). But the nature of Indian titles and effect given by the statute to the delivery and acceptance of the tribal deed make the doctrine of that case clearly inapplicable to allotment deeds."

In *Hunter vs. Watson*, *supra*, the court said:

"The deed of 1856 may be laid out of the question. It was made after the death of Knox, and although made to him and 'his heirs' the word heirs is not a word of purchase carrying title to the heir, but only qualifies the title of the grantee. A deed to a dead man is a nullity."

The case of the United States *vs. Hawkins et al.* (217 Fed., 11) is direct authority for the position taken by the Government in the instant case. In that case it was conclusively established that Chester Hawkins was born January 1, 1897, and died May 27, 1898. In 1904 his father appeared before the Commission and filed proof that Chester was living on the first day of April, 1899. The Commission accepted the proof as true, and admitted the name of Chester Hawkins to enrollment. Later the father made application for an allotment for Chester, and on the same day the Commission issued a certificate of allotment in the name of Chester Hawkins, and delivered it to his father. Afterwards homestead and allotment deeds were executed by the Principal Chief of the Creek Nation, and duly filed for record in the office of the Commission. On the 17th day of March, 1909, James and Ella Hawkins conveyed the property to E. S. Warner, as president of the Iowa Land & Trust Co., and on June 3, 1910, the latter executed and delivered an oil-and-gas lease thereon to L. C. Hivick and M. L. Seifred. The trial court found that the lessees of the Iowa Land & Trust Company were innocent purchasers, and there was a decree accordingly in their favor, from which the Government appealed. In passing on these facts in the Hawkins case, the Circuit Court of Appeals for the Eighth Circuit said:

"As we view the case, we do not think that it is one where the defense of innocent purchaser may be applied. Chester Hawkins having died before April 1, 1899, must be considered as having had no existence,

so far as being a citizen of the Creek Nation entitled to an allotment of land under any law of Congress. The patents issued by the Creek Nation ran to a person not in being, and therefore conveyed no title whatever. There being no ancestor entitled to an allotment of land, there was no land to which the heirs of Chester Hawkins were entitled. As we understand the Creek agreement, in cases where the ancestor dies before allotment, but after enrollment, the lands were to be conveyed directly to the heirs; therefore there was no pretense in this case that the heirs were seeking an allotment as representatives of a deceased ancestor: There can be no question but that the patents were void. The only question is as to whether a case is presented where under any circumstances an innocent purchaser of the land can be perfected. If no title passed from the Creek Nation, then the vendees of James and Ella Hawkins obtained no title, nor did the lessees of the Iowa Land & Trust Company."

* * * * *

And, again, in the same case, the same court said:

"We do not see how there can be any escape from this conclusion. The equitable doctrine of a *bona fide* purchaser without notice does not apply where there is a total absence of title in the vendor. The good faith of a purchaser cannot create a title where none exists. Tiffany's Real Property, 380 (Ed. 1903); Jones' Law of Real Property, 223; Hunter *vs.* Watson, 12 Cal., 363; 73 Am. Dec., 543. See also Boone *vs.* Chiles, 10 Pet., 177; 9 L. Ed., 388; Vattier *vs.* Hine, 7 Pet., 252; 8 L. Ed., 675; Sampeyreac *vs.* United States, 7 Pet., 222; 8 L. Ed., 665; Lindblom *vs.* Rocks, 146 Fed., 660; 77 C. C. A., 86; Texas Lumber Mfg. Co. *vs.* Branch, 60 Fed., 201; 8 C. C. A., 562; Dodge *vs.* Briggs (C. C.), 27 Fed., 160; Oakley *vs.* Ballard, Fed. Cas. No. 10,393.

"We are of the opinion that, as Chester Hawkins never had any existence so far as being entitled to an allotment of land is concerned, and having died prior to April 1, 1899, he was, so far as being an applicant for a patent to the land in controversy, a myth, and

that the language used by the Supreme Court in *Moffatt vs. United States*, 112 U. S., 31; 5 Sup. Ct., 14; 28 L. Ed. 263, is pertinent.

* * * * *

The case of *Moffatt vs. The United States* (112 U. S., 10) was a suit to cancel two patents of the United States, purporting to be issued to two persons, Phillip Quinlan and Eli Turner. It was sought to cancel the patents on the ground that Quinlan and Turner were fictitious and nonexistent.

The testimony established the truth of this ground, and there was a decree canceling the patents, but *Moffatt* and *Carr*, to whom the land patented had been transferred by a mesne conveyances, claimed to be innocent purchasers from the pretended patentees, and therefore entitled to ownership of the land on that account, and to be protected against the consequences of the fraudulent methods by which the patentees secured the issuance of the patents. From the decree in favor of the United States, *Moffatt* and *Carr* appealed, and this court, in passing on the case, said:

"The patents being issued to fictitious parties could not transfer the title, and no one could derive any right under a conveyance in the name of the supposed patentees. A patent to a fictitious person is, in legal effect, no more than a declaration that the Government thereby conveys the property to no one. There is, in such case, no room for the application of the doctrine that a subsequent *bona fide* purchaser is protected. A subsequent purchaser is bound to know whether there was, in fact, a patentee, a person once in being, and not a myth, and he will always be presumed to take his conveyance upon a knowledge of the truth in this respect. To the application of this doctrine of a *bona fide* purchaser there must be a genuine instrument having a legal existence, as well as one appearing on its face to pass the title. It cannot arise on a forged instrument or one executed to fictitious parties, that is, to no parties at all, however much deceived thereby the purchaser may be. Even in the case of negotiable instruments, where the doc-

trine is carried furthest for the protection of subsequent parties acquiring title to the paper, it cannot be invoked if the instrument be not genuine, or if it is executed without authority from its supposed maker. *Floyd's Acceptances*, 7 Wall., 667, 676; *Marsh vs. Fulton Co.*, 10 Wall., 683."

* * * * *

In his observations upon the majority opinion in the Hawkins case, Judge Hook said:

"I doubt that a deed or patent to a dead man is so utterly void that his heirs can convey no valid interest to an innocent purchaser. The ancient ceremony at the transfer of land, which required a living grantee, does not prevail in this country, and the rule based on it should give way. So much for the case of the lessees. In other respects I concur in the foregoing opinion."

In view of these observations by Judge Hook, there can be no mistake as to the meaning of the majority opinion handed down by Judge Carland. The issue in the case was as to whether or not an allotment certificate could lawfully be issued in favor of a Creek citizen who was concededly dead on May 27, 1898, and patents be issued thereafter in the name of such deceased citizen which would inure to the benefit of his heirs and so enable them to transfer a good title to the land thereby conveyed to an innocent purchaser. It will be noted that Judge Hook gives as his reason for his doubt that "the ancient ceremony at the transfer of land which required a living grantee does not prevail in this country and the rule based on it should give way."

It is true that anciently the transfer of land was accompanied by a certain ceremony which required a living grantee but which does not prevail in this country. I cannot agree with the learned judge, however, that the absence of a requirement of the ancient ceremony supersedes the necessity for the delivery of the written instrument now

required (except in rare instances), for the conveyance of title to land.

Under the feudal system the act of homage was required for the investiture of title, and this act did require a living grantee. The grantee did homage by "openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the Lord, who sate before him, and there professing, that 'he did become his man, from that day forth, of life and limb and earthly honor;' and then he received a kiss from his Lord" (Cooley's Blackstone, Vol. 1, p. 477).

By the common law livery of seisin was necessary to the investiture of title to corporeal hereditaments. This likewise required the presence of a living grantee. It was performed by the grantor and grantee going together upon the land to be conveyed, and there the grantor would, in the presence of witnesses, deliver to the grantee, all other persons being off of the land, "a clod or turf, or a twig or bough there growing, with words to this effect: I deliver these to you in the name of seisin of all the lands and tenelements contained in this deed" (Cooley's Blackstone, vol. 1, pp. 687 and 688).

In the reign of Charles II an act of parliament made invalid any grant of an interest in a freehold estate unless the grant was evidenced by a written instrument and signed by the grantor, or his lawfully authorized agent. Thereafterwards conveyances were required to be in writing, and in speaking of the essentials of such written deeds, Blackstone names writing and delivery as two of them, as follows:

"The deed must be written, or I presume printed, for it may be in any character or any language; but it must be upon paper or parchment. For if it be written on stone, board, linen, leather, or the like, it is no deed. Wood or stone may be more durable, and linen less liable to erasures; but writing on paper or parchment unites in itself, more perfectly than any other way, both these desirable qualities: for

there is nothing else so durable, and at the same time so little liable to alteration: nothing so secure from alteration, that is at the same time so durable. It must also have the regular stamps imposed on it by the several statutes for the increase of the public revenue: else it cannot be given in evidence. Formerly many conveyances were made by parol, or word of mouth only, without writing; but this giving a handle to a variety of frauds, the statute 29, Car. II. c. 3, enacts, that no lease-estate or interest in lands, tenements, or hereditaments, made by livery of seisin, or by parol only (except leases, not exceeding three years from the making of the real value), shall be looked upon as of greater force than a lease or estate at will; nor shall any assignment, grant, or surrender of any interest in any freehold hereditaments be valid; unless in both cases the same be put in writing, and signed by the party granting, or his agent lawfully authorized in writing."

(Cooley's Blackstone, vol. I, p. 672.)

And again:

"A requisite to a good deed is, that it be delivered by the party himself or his certain attorney, which therefore is also expressed in the attestation; 'sealed and delivered.' A deed takes effect only from this tradition or delivery: for if the date be false or impossible, the delivery ascertains the time of it. And if any person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing, and by a parity of reason the signing also, and makes them both his own. A delivery may be either absolute, that is, to the party or grantee himself; or to a third person, to hold till some conditions be performed on the part of the grantee: in which last case it is not delivered as a deed, but as an escrow; that is, as a scroll or writing, which is not to take effect as a deed till the conditions be performed; and then it is a deed to all intents and purposes."

(Cooley's Blackstone, vol. I, pp. 679 and 680.)

And again:

"Parties.—The first of which is, that there be persons able to contract and be contracted with for the purpose intended by the deed; and also a thing, or subject-matter to be contracted for; all which must be expressed by sufficient names. (f) So as in every grant there must be a grantor, a grantee, and a thing granted; in every lease a lessor, a lessee and a thing demised."

(Cooley's Blackstone, vol. I. p. 671.)

And again:

"Conveyances in writing were the last and most refined improvements. The mere delivery of possession, either actual or symbolical, depending on the ocular testimony and remembrance of the witnesses, was liable to be forgotten or misrepresented, and became frequently incapable of proof. * * * Written deeds were, therefore, introduced, in order to specify and perpetuate the peculiar purposes of the party who conveyed; yet, still, for a very long series of years, they were never made use of, but in company with the more ancient notorious method of transfer, by delivery or corporal possession."

(Cooley's Blackstone, vol. I. p. 686.)

It is true that the ancient ceremonial attendant upon, and required for, the transfer of real estate has passed away. It is equally true that it had passed away long before Blackstone wrote his treatise on the common law of England, although he states that for many years deeds were issued only in company with the ancient methods of transfer by delivery of corporal possession. Deeds were written, and were required by law to be written, at the time Blackstone wrote. It was a written deed, therefore, to which he was referring, when he stated that delivery was a requisite to a good deed. So continues to be the common law to this day, not only of deeds conveying real estate, but of any other written instrument creating an obligation.

If I sign a promissory note and keep it in my pocket, I have not created any obligation upon my part to pay the sum of money therein named to the payee. But if I deliver the promissory note to him, or to some person for him, the obligation to pay the amount of the note arises upon my part. So of a deed. If I prepare, sign and acknowledge a deed conveying my real estate, in anticipation of a possible business transaction, and keep it locked in my desk in my office, I have not divested myself of the title so long as the deed remains in my desk. If, however, I hand the deed to the grantee named in it, with intent to pass the title, the title passes from me to him. No difference in principle can be perceived between the deed of a private individual and a deed by the Creek Nation. The deeds issued in the name of Barney Thlocco, executed by the Principal Chief of the Creek Nation and approved by the Secretary of the Interior, have never been delivered. They were given to the Principal Chief for delivery, but, while in the hands of the chief for that purpose, they were recalled by the Dawes Commission for further investigation into the rights of Thlocco to enrollment. Nor could the chief have delivered the deeds to Thlocco, with whatever promptness he might have acted, if the facts offered in proof by the Government were true. According to that offer, Thlocco had died prior to April 1, 1899, and delivery to him was, therefore, impossible.

According to Blackstone, as above quoted, it is essential to a deed that there be a person able to contract and be contracted with, that there be a grantor, a grantee and a thing to be granted. By the term grantee, a living, sentient person was intended. Divestiture of title, to be effective, must be followed by investiture, and for purposes of investiture there must be a person in being who may accept the title and in whom it may repose. A dead person can neither accept title nor act as a repository for one. If, therefore, the owner of real estate attempt to divest himself of his title by conveyance thereof to a dead person, he ac-

completes nothing, for the title remains in him, where it was before he attempted its conveyance. This being true no title whatever passes, and the doctrine of an innocent purchaser for value, without notice, does not obtain. As was said in the Hawkins case: "The good faith of a purchaser cannot create a title where none exists."

In considering this case it must be borne in mind that the Government offered to prove that Thlocco died anterior to the enrollment of his name, the issuance of the certificate of allotment and the execution of the patents. For purposes of this case it must be assumed that these facts are all true. We have seen that the act of Congress provides that all citizens who were living on the first day of April, 1899, should be placed upon the rolls to be made by the Commission under the act of June 28, 1898. The act utterly excludes the idea of authority to the Commission to place a *dead* citizen on the roll. There must, therefore, be a valid subsisting enrollment before there can be a valid subsisting allotment, or a valid subsisting deed, made pursuant to such enrollment and allotment. If the enrollment is invalid, because made in the name of a person *not in being* at the time, all proceedings based upon the enrollment are void, and this, too, as to an innocent purchaser for value. The enrollment of a *dead* citizen is equivalent to the creation of a *fictitious* person. In contemplation of law, and for the purpose of receiving and accepting title, a dead person and a fictitious person occupy the same plane. Neither can act in the capacity of grantee, and a grantee is just as essential to a valid conveyance of real estate as is a grantor, or the real estate to be granted.

It follows that the enrollment, the allotment and the deeds were all as though they had been made in the name of a fictitious person and this court has said, in *Moffatt vs. United States, supra*, that a patent issued to a fictitious person "could not transfer the title and no one could derive any right under a conveyance in the name of the supposed

patentee." And again in the same case the court said, that to apply the doctrine of a *bona fide* purchaser "there must be a genuine instrument having a legal existence as well as one appearing on its face to pass the title. It cannot arise on a forged instrument or one executed to fictitious parties, that is, to no parties at all, however much deceived thereby the purchaser may be."

This case has been followed by the Ninth Circuit Court of Appeals in the case of *McLeod vs. United States* (187 Fed., 261), and *McClure vs. United States* (187 Fed., 265). In both cases the Ninth Circuit Court of Appeals held that innocent purchase constitutes no defense to the holder of a title procured by, and made to, a fictitious person.

Under the *Hawkins*, *Moffatt* and *McLeod* cases, it would seem that a purchaser of real estate is bound to know that the title thereto passed from the Government to a person in being and capable of receiving and accepting it. To the same effect is the decision of this court in the case of *Sampoyriac vs. U. S., 7 Peters*.

It may be contended, however, that under the terms of section 5 of the act of April 26, 1906, or section 32 of the act of June 25, 1910, the title to the lands described in the patents issued in the name of Barney Thlocco inured to, and became vested in, his heirs. A close examination of the two acts precludes any such conclusion. Both acts presuppose an ancestor living on April 1, 1899. The act of April 26, 1906, goes still further and presupposes an *allottee*.

Section 5 of the act of April 26, 1906, is as follows:

"That all patents or deed to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if

the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same: *Provided*, the provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this act."

Section 32 of the act of June 25, 1910, is as follows:

"Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued, in pursuance of any tribal agreement or act of Congress, to a person who had died or who hereafter dies before the approval of such deed, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assigns of such deceased grantee as if the deed had issued to the deceased grantee during life."

In the Creek Nation the patents were executed by the Principal Chief, and were then forwarded to the Secretary of the Interior for his approval. Thereafterwards they were filed for record in the office of the Dawes Commission. Following their recordation they were handed back to the chief for delivery to the patentees, or other persons authorized to receive them, and became effective to pass title only upon such delivery.

The purpose of the act of 1906 was to make recordation of patents equivalent to their delivery, but this statute applied only to those persons to whom an allotment had in fact been made, in conformity with the prescribed law and procedure governing allotments, and who had died thereafterwards, before such patents became effective. A close reading of sec-

tion 5 will show that it is susceptible of no other construction. If, as in the present case, the person named in the certificate of allotment died prior to April 1, 1899, there could be no allottee, and, therefore, no heirs to whom the lands described in the certificate of allotment and patents might descend. Had Thlocco been a lawful allottee, and had he died between the issuance of the certificate of allotment and the time when the patent become effective, then a different question might arise, but that question does not arise in this case, although it is submitted that the act does not expressly abrogate the common-law rule requiring a living grantee at the time when the patent is executed.

Nor does the act of June 25, 1910, apply to the facts in the present case. By that act it is provided that, where the person to whom a deed to tribal land had been issued had died before the approval of the deed the title to the land would inure and become vested in the heirs of the patentee, as if the deed had issued to the patentee during his lifetime. In this act the word "person" is used instead of the word "allottee," as in the act of 1906, but it likewise refers to deeds issued pursuant to any tribal agreement or act of Congress. It will be noted that the act applies to a deed issued "to a person who had died, or who hereafter dies, before the approval of such deed." Plainly this means a deed which had been executed in the lifetime of the grantee, but before its approval by the Secretary of the Interior such grantee had died. Whatever may have been the intent of Congress in enacting this statute, it has no application to the case under consideration, and this is equally true of the act of 1906.

Thlocco was either living on April 1, 1899, or he was dead. If living, he was entitled to enrollment, so far as that qualification is concerned; but if dead, he was not entitled to enrollment, and the Dawes Commission was without jurisdiction to enroll him, regardless of his qualifications in other respects. If he was not entitled to enrollment, he was not entitled to an allotment, and no patents conveying to him any

part of the public domain of the Creek Nation could lawfully be issued in his name. The Government offered to prove that he died in January, 1899. It must be assumed by this court that the Government would have sufficiently established that fact had it been permitted to do so by the trial court. In refusing to permit the Government to make this proof, the trial court, in the opinion of counsel for the Creek Nation, acted upon an erroneous theory, which the Government now asks this court to correct. In support of this contention we cite the court to the opinion of the Circuit Court of Appeals for the Eighth Circuit in the Hawkins case, *supra*, as follows:

"It is claimed that section 5 of the act of Congress of April 26, 1906 (34 Stat., 137), and section 32 of the act of Congress of June 25, 1910 (36 Stat., 855), relieve the case of the difficulties which have been mentioned. These laws have no application where there is no allottee. The language used in section 5 assumes that there is in existence a legal allottee, and provides for the contingency of the death of the allottee before the patent becomes effective. This law that, if the death of the allottee occurs before the patent becomes effective, the land shall inure to and vest in his heirs. Section 32 is to the same effect. It assumes that deeds have been issued to a legal allottee, who has died before the approval of the deed. Neither section deals with the case where there never was an allottee in existence."

Appellees might cite the cases of Skelton *vs.* Dill (235 U. S., 206) and Mullen *et al.* *vs.* United States (56 L. Ed., 834), decided by this court, and the case of United States *vs.* Jacobs (195 Fed., 707), decided by the United States Circuit Court of Appeals for the Eighth Circuit, as militating against the position taken by the Government in the instant case, but in the opinion of counsel for the Creek Nation those cases are without application here. A critical examination will disclose the facts in each to be different from the facts presented by the record in this case. In the Jacobs case the

patent was issued directly to the heirs, and not in the name of the deceased citizen. What was said by the court in the Mullen and Skelton cases, insofar as it relates to the present case, was mere dicta and unrelated to the questions in fact decided by the court.

Did the Commission to the Five Civilized Tribes Possess the Power to Make an Arbitrary Selection and Allotment in the Creek Nation Without the Intervention of the Citizen or His Heirs?

Subsequent to the enrollment of the name of Barney Thlocco, and on May 24, 1902, the Dawes Commission adopted the following resolution (Tr., p. 45):

"MUSKOGEE, INDIAN TERRITORY, May 24, 1902.

"A session of the Commission to the Five Civilized Tribes was held at its general office at Muskogee, Indian Territory, on the above date, there being present Commissioners Bixby, Needles, and Breckenridge.

* * * * *

"Whereas, section three of the act of Congress approved March 1, 1901 (31 Stat., 861), known as the Creek Agreement, provides that

"All lands of said tribe except as herein provided shall be allotted among the citizens of the tribe by said Commission so as to give to each citizen an equal share of the whole in value as nearly as may be."

and that

"* * * there shall be allotted to each citizen one hundred and sixty acres of land."

"And

"Whereas, section seven of said act provides that,

"* * * each citizen shall select from his allotment forty acres of land as a homestead,"

"And that

" * * * if for any reason such selection shall not be made for any citizen, it shall be the duty of said Commission to make selection for him."

"And, whereas, numerous citizens of said nation have made no selection of land for allotment and others have made selections of only a portion of the land to which they are entitled, and

"Whereas, after due notice given, many citizens of said nation have failed to make a selection of a homestead, therefore, be it

"*Resolved*, That the acting chairman is hereby authorized and empowered by and on behalf of the Commission to allot to each citizen out of the lands of the Creek Nation not heretofore allotted or selected such an amount of land of at least average quality as will make the total allotment of each citizen one hundred and sixty acres, and to select a homestead for such citizens in all cases where a selection of a homestead has not been made by or on behalf of said citizen;

"*Provided*, That the allotment and selection of homestead so made for a citizen shall include improvements shown by the plats or records of the office to belong to said citizen."

"On motion of Commissioner Breckenridge, duly seconded, the same was unanimously adopted.

* * * * *

"There being no further business before the meeting the Commission on motion was adjourned.

"TAMS BIXBY,

"*Acting Chairman*."

"Attest:

"A. L. AYLESWORTH, *Secretary*."

It was under the pretended authority of this resolution that an allotment was set apart to Barney Thlocco.

A review of the various acts of Congress and agreements made with the Creeks, as applied to the facts in this case, brings us then to enquire, by what authority did the Dawes

Commission undertake to segregate 160 acres of the lands belonging to the Creek Indians and allot same in the name of Barney Thlocco? Was the allotment made to Barney Thlocco in conformity with any act of Congress or agreement made with the tribe? And, if not, is it too late for the Creek Nation to raise the question?

In discussing this question I do not think that it is improper to call attention to its tremendous importance, as it affects not only the allotment in this case, worth approximately \$2,000,000, but also allotments involved in litigation pending in the United States District Court for the Eastern District of Oklahoma, valued at many millions more.

In considering this question the court will bear in mind the facts in this case. These indisputable or undisputed facts are shown by this record:

1st. Barney Thlocco was enrolled opposite Creek Roll No. 8592, May 24, 1901 (Tr., p. 38).

2d. There exists no record showing that the Commission took any evidence, oral or documentary, to determine his right to enrollment (Tr., p. 37).

3d. Thlocco died prior to June 30, 1902. (The Government offered to prove that he died prior to April 1, 1899 (Tr., p. 111). The defendants, in their answer, say he died prior to the 30th day of June, 1902 (paragraph 8, p. 30).

4th. An allotment was arbitrarily made by the Commission to and in the name of Barney Thlocco on June 30, 1902 (Tr., p. 44).

5th. Homestead and allotment deeds were issued to and in the name of Barney Thlocco on March 11, 1903, and approved April 3, 1903 (Tr., pp. 47 and 48).

6th. These deeds were sent to the chief of the Creek Nation for delivery to the allottee. There then arose a question as to whether or not Thlocco was entitled to an allotment, and the patents were, on August 31, 1904, recalled from the chief of the Creek Nation and returned to the files of the Commission where they have since remained, and no patent was ever delivered to any person conveying any part of said allotment (Tr., p. 49). The Government offered to prove that an investigation was then made and that subsequently and on December 13, 1906, the Secretary of the Interior ordered the name cancelled (Tr., p. 61).

7th. The Government offered to prove that the lands allotted in the name of Thlocco were unimproved, and had not been tilled, or in any other manner occupied, prior to the time the allotment was cancelled by the Secretary of the Interior, or prior to the attack by the Government in this case. The offer was refused upon objection by defendants (Tr., p. 51).

8th. If Barney Thlocco was known to the Commission to be living on April 1, 1899, at the time he was enrolled, there is no record, communication, oral or documentary evidence, in the possession of the Commission showing this fact, nor is there any person, connected with the Commission at that time, who remembers anything concerning his enrollment, except that the name, with numerous others, was enrolled at Okmulgee on May 24, 1901.

Negotiations Leading Up to Enrollment and Allotment of Creek Citizens.

A proper understanding of the necessity existing on the part of Congress to treat with the Creek Tribe of Indians, and to secure their consent to the allotment of their lands in severalty, as contended herein, as well as an understanding of the various acts of Congress relating to the enroll-

ment and allotment of these people, requires also an understanding of the early history of the tribe.

As will be remembered, the Creek Indians at one time owned practically all the territory now embraced in the States of Georgia and Alabama. As early as 1790, by reason of the turbulent and war-like disposition of the Creek Indians, agitated by the encroachment of the white man on their domain, the people of Alabama and Georgia prevailed upon the Federal Government to remove them to some other territory in the United States.

Between 1790 and 1825 negotiations were going on between the Government and the Creek Indians with a view to that purpose. These negotiations culminated in the treaty of 1825. History records that the Creek Indians became so embittered against the Government and their theretofore beloved chieftain and leader, William McIntosh, by reason of his participation in this treaty, that they formed a mob and executed McIntosh under the pretended authority of a law then upon their statute books forbidding, under penalty of death, any one from attempting to convey any part of their domain.

Subsequently, and in 1826, another treaty was negotiated by the terms of which it was agreed that five of the leading or head men of the Creek Nation should visit the country west of the Mississippi River and there secure a new home for the tribe. This committee having reported, and negotiations having been completed, the treaty of March 24, 1832 (7 Stat., 366), was entered into between the Creeks and the Government, by which it was agreed that the Creeks should surrender their lands in Georgia and Alabama in lieu of the territory to be granted to them by the Government west of the Mississippi, which had been selected by the committee under the treaty of 1826.

On February 14, 1833, another treaty was signed, which defines the boundary of the territory to be granted to the Creeks by the Government, and which constitutes the pres-

nt boundary of the Creek and Seminole Nations (7 Stat., 70).

Because of the conditions existing in the States of Georgia and Alabama, the Creeks required the Government to agree, in consideration of their surrendering their lands in those States, that they would not be molested in the occupancy of the lands ceded to them west of the Mississippi.

Articles I and III of said treaty are as follows:

"Art. I. The Muskogee or Creek Nation of Indians, west of the Mississippi declare themselves to be the friends and allies of the United States, under whose parental care and protection they desire to continue; and that they are anxious to live in peace and friendship not only with their near neighbors and brothers, the Cherokees, but with all the surrounding tribes of Indians."

"Art. III. The United States will grant a patent, in fee-simple, to the Creek Nation of Indians for the land assigned said nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States—and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned them."

Subsequent to the signing of this treaty, and on August 11, 1852, the United States executed and delivered to the Creek Indians a patent conveying to them that territory thereafter known as the Creek Nation in the Indian Territory. The granting and *habendum* clause in this patent is as follows:

"Now know ye, That the United States of America, in consideration of the premises and in conformity with the above recited provisions of the treaty aforesaid, have given and granted, and by these presents do give and grant, unto the said Muskogee, or Creek tribe of Indians, the tract of country above described. To have and to hold the same unto

the said tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby conveyed to them."

This patent is of record in volume 4 of Indian deeds, at pages 446 and 447, in the office of the Commissioner of Indian Affairs at Washington.

It will be observed that the treaty of 1833 provided that the United States would grant to the Creek Indians in fee simple the lands described in said treaty, the consideration moving from the Creek Indians to the Government being the agreement of the former to surrender the territory owned and occupied by them in Georgia and Alabama.

It was held in the case of *Holden vs. Joye*, 84 U. S., 211, that—

"the Indian tribes are capable of taking as owners in fee simple lands by purchase, where the United States in form, and for valuable and adequate consideration, so sell them to them. Such a sale is properly made by treaty."

That the Creek Indians believed they were acquiring a title in fee simple to all of the territory embraced in the boundary described in their patent, there can be no question. Such would have been the interpretation placed upon this grant by any untutored and unlettered people.

See also:

Choctaw Nation vs. United States, 119 U. S., 1.

United States vs. Winans, 198 U. S., 371.

Choate vs. Trapp, 224 U. S., 665.

Shulthis vs. McDougal, 170 Fed., 529.

Woodward vs. de Graffenried, 238 U. S., 284.

In the case of *Choctaw Nation vs. United States*, *supra*, this court said:

"In reviewing the controversy between the parties presented by this record, it is important and necessary to consider and dispose of some preliminary

questions. The first relates to the character of the parties, and the nature of the relation they sustain to each other. The United States is a sovereign nation, not suable in any court except by its own consent, and upon such terms and conditions as may accompany that consent, and is not subject to any municipal law. Its government is limited only by its own constitution, and the nation is subject to no law but the law of nations. On the other hand, the Choctaw Nation falls within the description, in the terms of our constitution, not of an independent state or sovereign nation, but of an Indian tribe. As such it stands in a peculiar relation to the United States. It was capable under the terms of the constitution of entering into treaty relations with the government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose—as it did determine in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes—to exert its legislative power.

“As was said by this court recently in the case of *U. S. vs. Kagama*, 118 U. S., 375; S. C., 6 Sup. Ct. Rep., 1109: ‘These Indian tribes are the wards of the nation. They are communities dependent on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive, by Congress, and by this court, whenever the question has arisen.’”

“It had accordingly been said in the case of *Worcester vs. Georgia*, 6 Pet., 582: ‘The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only

in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.' "

"The recognized relation between the parties of this controversy, therefore, is that between a superior and inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence formulating the rights and obligations of private persons, equally subject to the same laws.

"The rules to be applied in the present case are those which govern public treaties, which, even in case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations."

* * * * *

"It is notorious as an historical fact, as it abundantly appears from the record in this case, that great pressure had to be brought to bear upon the Indians to effect their removal, and the whole treaty was evidently and purposely executed, not so much to secure to the Indians the rights for which they had stipulated, as to effectuate the policy of the United States in regard to their removal. The most noticeable thing, upon a careful consideration of the terms of this treaty, is that no money consideration is promised or paid for a cession of lands the beneficial ownership of which is assumed to reside in the Choctaw Nation, and computed to amount to over 10,000,000 of acres. It was not an exchange of

lands east of the Mississippi River for lands west of that river. The latter tract had already been secured to them by its cession under the treaty of 1820."

In the case of *Woodward vs. de Graffenried*, *supra*, Mr. Justice Pitney, speaking for the court, said:

"The Curtis bill, as introduced in the House, did not contain the provisions of the present sections 29 and 30 (30 Stat. at L., 505, 514, chap. 517), ratifying, with amendments, and submitting to the approval of the members of the respective tribes, the Atoka agreement and the Creek agreement of September 27, 1897, then recently rejected by the Indians. These were added as a Senate amendment, perhaps at the suggestion of the Dawes Commission, for it appears from their 5th Report, p. 1053, that they were in Washington co-operating with Congress respecting this legislation. Section 11, however, in substantially its final form, was a part of the original bill. Sections 16, 17, and 23, also, but in somewhat different form, were in the bill as introduced.

"It is evident that at the time this law was enacted, Congress entertained serious doubts as to its constitutional power to interfere with the tribal lands of the Five Civilized Tribes or to overthrow the tribal governments without the consent of the Indians."

That Congress recognized the Creeks to be the absolute owners of the lands embraced within their domain is shown by the act of March 3, 1893 (27 Stat., 612), section 16 providing, in part, as follows:

"The President shall nominate and, by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muskegee (or Creek) Nation, the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the

allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory."

Acts of Congress and Agreements Relating to Enrollments.

Subsequent to the passage of the act of March 3, 1893, *supra*, negotiations were begun looking to the enrollment of the citizens of this tribe, preliminary to their allotment of lands in severalty, resulting in the following acts being passed by Congress:

Act of June 10, 1896 (29 Stat., 339).

Act of June 7, 1897 (30 Stat., 62).

Act of June 28, 1898, commonly known as the Curtis act (30 Stat., 495).

Act of March 31, 1900 (31 Stat., 221).

Original Creek agreement approved March 1st, 1901 (31 Stat., 861).

Supplemental Creek Agreement approved June 30, 1902 (32 Stat., 500).

The act of Congress of June 10, 1896, *supra*, among other things, provides:

"* * * and said Commission is directed to continue the exercise of the authority already conferred upon them by law and endeavor to accomplish the object heretofore prescribed to them and report from time to time to Congress.

"That said Commission is further authorized and directed to proceed at once to hear and determin

the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled;

“Provided, however, That such application shall be made to such Commissioners within three months after the passage of this act.

“The said Commission shall decide all such applications within ninety days after the same shall be made.

“That in determining all such applications said Commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages and customs of each of said nations or tribes;

And provided, further, That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be admitted to said rolls as a citizen of either of said tribes and whose rights thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

“In the performance of such duties said Commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of said Territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be heretofore held and considered to be the true and correct rolls of persons

entitled to the rights of citizenship in said several tribes;

"Provided, That if the tribes, or any person, be aggrieved with the decision of the tribal authorities or the Commission provided for in this act, it or he may appeal from such decision to the United States district court.

"Provided, however, That the appeal shall be taken within sixty days, and the judgment of the court shall be final.

"That the said Commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States courts, as provided herein.

"The Commission is hereby required to file the lists of members as they finally approve them with the Commissioner of Indian Affairs to remain there for use as the final judgment of the duly constituted authorities."

The act of June 7, 1897, *supra*, among other things, provides:

"That said Commission shall continue to exercise all authority heretofore conferred on it by law to negotiate with the Five Tribes, and any agreement made by it with any one of said tribes, when ratified, shall operate to suspend any provisions of this act if it conflict therewith as to said nation.

"Provided, That the words 'rolls of citizenship,' as used in the act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and

such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the Commission under the act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such Commission for a period of six months after the passage of this act. And any name appearing on such rolls and not confirmed by the act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such Commission where the party affected shall have ten days' previous notice that said commission will investigate and determine the right of such party to remain upon such roll as a citizen of such nation.

"*Provided, also,* That any whose name shall be stricken from the roll by such Commission shall have the right of appeal, as provided in the act of June tenth, eighteen hundred and ninety-six."

Section 11 of the act of June 28, 1898, *supra*, provides:

"That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the Commission heretofore appointed under act of Congress, and known as the 'Dawes Commission,' shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, as far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same. * * *"

Section 21 of said act reads, in part, as follows:

"Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls all such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their

descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and laws of said tribe. * * *

"Said Commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes, and the United States court in Indian Territory shall have jurisdiction to compel the officers of the tribal government and custodians of such rolls and records to deliver the same to said Commission and on their refusal or failure to do so to punish them as for contempt; as also to require all citizens of said tribes, and persons who should be so enrolled, to appear before said Commission for enrollment, at such times and places as may be fixed by said Commission, and to enforce obedience of all others concerned, so far as the same may be necessary, to enable said Commission to make rolls as herein required, and to punish anyone who may in any manner or by any means obstruct said work."

"The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons who may intermarry according to tribal laws, shall also constitute the several tribes which they represent."

"The members of said Commission shall, in performing all duties required of them by law, have authority to administer oaths, examine witnesses, and send for persons and papers; and any person who shall willfully and knowingly make any false affidavit or oath to any material fact or matter before any member of said Commission, or before any other officer authorized to administer oaths, to any affidavit or other paper to be filed or oath taken before said Commission, shall be deemed guilty of perjury and on conviction thereof shall be punished as such offense."

The act of May 31, 1900, provides, in part, as follows:

“* * * That said Commission shall continue to exercise all authority heretofore conferred on it by law. But it shall not receive, consider, or make any record of any application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, and its refusal of such application shall be final when approved by the Secretary of the Interior:

“*Provided*, That any Mississippi Choctaw duly identified as such by the United States Commission to the Five Civilized Tribes, shall have the right to, at any time prior to the approval of the final rolls of the Choctaws and Chickasaws by the Secretary of the Interior, to make settlement within the Choctaw-Chickasaw country, and on proof of the fact of *bona fide* settlement may be enrolled by the said United States Commission and by the Secretary of the Interior as Choctaws entitled to allotment: *Provided further*, That all contracts or agreements looking to the sale or incumbrance in any way of the lands to be allotted to said Mississippi Choctaws shall be null and void.”

Section 28 of original Creek agreement provides:

“No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.

“All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled ‘An act for the protection of the people of the Indian Territory, and for other purposes,’ shall be placed upon the rolls to be made by said Commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the

lands and money to which he would be entitled living, shall descend to his heirs according to the law of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

* * * * *

"The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be final rolls of citizenship of said tribe, upon which the allotment of all lands and distribution of all moneys and other property of the tribe shall be made, and to no other persons."

Act of March 3, 1901, provides, in part, as follows:

"* * * The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent; and the Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes, or either of them, for closing said rolls, but upon failure or refusal of said tribes or any of them to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no name shall be added thereto."

Sections 7, 8, and 9 of Creek supplemental agreement provide:

"7. All children born to those citizens who are entitled to enrollment as provided by the act of Congress approved March 1, 1901 (31 Stat. L., 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly.

"8. All children who have not heretofore been listed for enrollment living May 25, 1901, born to citi-

whose names appear upon the authenticated rolls of 1890 or upon the authenticated rolls of 1895, and entitled to enrollment as provided by the act of Congress approved March 1, 1901 (31 Stat. L., 861), shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die, before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly.

"9. If the rolls of citizenship provided for by the act of Congress approved March 1, 1901 (31 Stat. L., 861), shall have been completed by said Commission prior to the ratification of this agreement, the names of children entitled to enrollment under the provision of sections 7 and 8 hereof shall be placed upon a supplemental roll of citizens of the Creek Nation, and said supplemental roll, when approved by the Secretary of the Interior, shall in all respects be held to be a part of the final rolls of citizenship of said tribe: *Provided*, that the Dawes Commission be, and is hereby, authorized to add the following persons to the Creek roll: Mar-wal-le-pe-se, Mary Washington, Walter Washington, and Willie Washington, who are Creek Indians, but whose names were left off the roll through neglect on their part."

The foregoing are all of the provisions of law relating to the subject of enrollment, in so far as citizens enrolled prior to May 25, 1901, are concerned.

Acts of Congress and Agreements Relating to Allotments.

This brings us to a discussion of the acts of Congress authorizing allotments to be made in the Creek Nation to citizens of that nation who were enrolled prior to May 25, 1901.

In so far as this question is involved, the following acts of Congress constituted the only authority ever vested in the Dawes Commission to allot citizens of the Creek Nation: The Curtis Act (30 Stat., 495), the original Creek Agree-

ment (31 Stat., 861), the Supplemental Creek Agreement (32 Stat., 500).

Section 11 of the Curtis Act merely vested in the Commission the right to allot the surface of the lands to the citizens of the Creek Nation, and such allotment only vested in the allottee a mere right of occupancy. *Woodward vs. de Grafenried*, 238 U. S., 284.

What might properly be termed the first act of Congress authorizing the allotment of the public domain of the Creek Nation to the citizens thereof was the original Creek Agreement, *supra*, approved March 1, 1901, and ratified by the Creek Tribal Council on May 25, 1901. By section 3 of this agreement the United States guaranteed to distribute the property of the tribe equally among its members, said section providing:

"All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said Commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values; and any allottee receiving lands of less than such standard value may, at any time, select other lands, which, at their appraised value, are sufficient to make his allotment equal in value to the standard so fixed.

"If any citizen select lands the appraised value of which, for any reason, is in excess of such standard value, the excess of values shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds of the tribe until all other citizens have received lands and money equal in value to his allotment. If any citizen select lands the appraised value of which

is in excess of such standard value, he may pay the overplus in money; but if he fail to do so, the same shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds until all other citizens shall have received lands and funds equal in value to his allotment; and if there be not sufficient funds of the tribe to make the allotments of all other citizens of the tribe equal in value to his, then the surplus shall be a lien upon the rents and profits of his allotment until paid."

It will be observed that this act presupposes that the allottee will select his allotment.

If the foregoing section leaves any doubt as to the soundness of the contention of counsel for the Creek Nation that each allottee was required to select his allotment, it is removed by the next section of the act, providing for the selection of allotments for minors, prisoners, convicts, and aged and infirm persons, said section 4 providing:

"Allotment for any minor may be selected by his father, mother, or guardian, in the order named, and shall not be sold during his minority. All guardians or curators appointed for minors and incompetents shall be citizens.

"Allotments may be selected for prisoners, convicts, and aged and infirm persons by their duly appointed agents, and for incompetents by guardians, curators, or suitable persons akin to them, but it shall be the duty of said Commission to see that such selections are made for the best interests of such parties."

It was only in the case of selections of the homestead out of the selected allotments that the Dawes Commission was authorized to act independently of the citizens for whom allotments were being made. This authority was conferred by the second paragraph of section 7 of said act, which reads as follows:

"Each citizen shall select from his allotment forty acres of land as a homestead, which shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above: *Provided*, That selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who cannot select for themselves, may be made in the manner herein provided for the selection of their allotments; and if, for any reason, such selection be not made for any citizen, it shall be the duty of said Commission to make selection for him."

Section 45 of said act provides:

"All things necessary to carrying into effect the provisions of this agreement, not otherwise herein specifically provided for, shall be done under authority and direction of the Secretary of the Interior."

I do not believe that it will be seriously contended that section 45 was ever intended to give the Secretary of the Interior authority to arbitrarily allot lands belonging to the Creek tribe of Indians to the members thereof. If such was the intention of Congress, the jurisdiction was never exercised by the Secretary of the Interior, for there cannot be found any authority emanating from the Secretary of the Interior to the Commission to the Five Civilized Tribes to arbitrarily allot any citizen of the Creek Nation. There is a reason for the provisions of the Acts of Congress requiring each citizen of the Creek Nation to select for himself, or to have selected by some person standing in a trust relationship to the allottee, the distributive share of the lands to which each member of the tribe was entitled.

In another part of this brief, reviewing the early treaties between the Creek tribe of Indians and the United States, we find that the tribe owned in fee simple a large area of lands in Georgia and Alabama; that these lands were finally traded by the Creeks for an equal number of acres west of the Mis-

Mississippi known as the "Creek Nation"; that article 3 of the treaty of 1833, *supra*, provided that the Creek Nation would be conveyed to the Creek Indians in fee simple; that pursuant to this treaty, and on August 11, 1852, the United States made, executed and delivered to the Creek Indians a patent conveying said lands to them; that by these treaties the Government of the United States conveyed to these wards of the Government the highest character of title which can be granted. In dealing with them as their wards the Government owed them not only the duty of defending this title against any encroachment, but to keep inviolate the terms of the agreement as understood by these dependent people.

When the original agreement of March 1, 1901, was signed the United States recognized in the tribe the rights guaranteed by the treaty of 1833 to hold in common the public domain of the Creek Nation. The duty, therefore, devolved upon each citizen of the tribe to make his application for his selection of an allotment a surrender of all his right, title, and interest, in and to the remaining portion of the public domain.

Subsequent to the ratification and approval of the original Creek agreement, and on June 26, 1902, the Creek Tribal Council ratified what is known as the "Supplemental Agreement with the Creek Indians," which was approved on June 30, 1902. This supplemental agreement does not contain any provision which could be construed as authorizing the Commission to the Five Civilized Tribes to select an allotment for any member of the Creek tribe of Indians. The only provisions of the supplemental agreement relating to the question of allotments are sections 3, 4, and 5 of said agreement, which read as follows:

3. "Paragraph 2 of section 3 of the agreement ratified by said act of Congress approved March 1, 1901, is amended and as so amended is re-enacted to read as follows:

"If any citizen select lands the appraised value of which is \$6.50 per acre, he shall not receive any

further distribution of property or funds of the tribe until all other citizens have received lands and moneys equal in value to his allotment.'

"4. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes to determine, under the direction of the Secretary of the Interior, all controversies arising between citizens as to their right to select certain tracts of land.

"5. Where it is shown to the satisfaction of said Commission that it was the intention of a citizen to select lands which include his home and improvements, but that through error and mistake he had selected land which did not include said home and improvements, said Commission is authorized to cancel said selection and the certificate of selection or allotment embracing said lands, and permit said citizen to make a new selection including said home and improvements; and should said land including said home and improvements have been selected by any other citizen of said nation, the citizen owning said home and improvements shall be permitted to file, within ninety days from the ratification of this agreement, a contest against the citizen having previously selected the same and shall not be prejudiced therein by reason of lapse of time or any provision of law or rules and regulations to the contrary."

In the agreement with the Choctaw and Chickasaw Indians, approved July 1, 1902 (32 Stat., 641), authority was given the Dawes Commission to arbitrarily allot members of said tribe, section 17, providing:

"If, for any reason, an allotment should not be selected or a homestead designated by, or on behalf of, any member or freedman, it shall be the duty of said Commission to make said selection and designation."

No such provision as is contained in the Choctaw and Chickasaw Agreement is found in any acts of Congress relating to the work of allotting citizens of the Creek Nation.

The attention of the court is called to the similarity of

the agreement made with the Creek Nation and the agreement made with the Choctaw-Chickasaw Nations. They were, however, dissimilar in that, in the agreement with the Creek Nation no authority was conferred upon the Dawes Commission to make an arbitrary allotment, whereas in the Choctaw-Chickasaw agreement it is provided that an allotment shall be made by the Commission in the event that the citizen does not select an allotment.

In the case of *Choate vs. Trapp* (56 L. Ed., 944), the Supreme Court of the United States in discussing the provisions of the Choctaw-Chickasaw agreement used the following language:

"The individual Indian had no title or enforceable right in the tribal property. But as one of those entitled to occupy the land, he did have an equitable interest, which Congress recognized, and which it desired to have satisfied and extinguished. The Curtis act was framed with a view of having every such claim satisfactorily settled. And though it provided for a division of the land in severalty, it offered a patent of nontaxable land only to those who would relinquish their claim to the other property of the tribe formerly held for their common use. For the Atoka agreement, after declaring that 'all land allotted should be nontaxable,' stipulated further that each enrolled member of the tribes should receive a patent framed in conformity with the agreement, and that each Choctaw and Chickasaw who accepted such patent should be held thereby to assent to the terms of this agreement, and to relinquish all of his right in the property formerly held in common.

"There was here, then, an offer of nontaxable land. Acceptance by the party to whom the offer was made, with consequent relinquishment of all claim to other lands, furnished a part of the consideration, if, indeed, any was needed in such a case, to support either the grant or the exemption. Citing authorities.

"Upon delivery of the patent the agreement was executed, and the Indian was thereby vested with all the right conveyed by the patent, and, like a grantee

in a deed poll, or a person accepting the benefit of a conveyance, bound by its terms, although it was not actually signed by him. Citing authorities.

"As the plaintiffs were offered the allotments on the conditions proposed; as they accepted the terms, and, in the relinquishment of their claim, furnished a consideration which was sufficient to entitle them to enforce whatever rights were conferred, we are brought to a consideration of the question as to what those rights were."

On April 24, 1902, Mr. Justice Van Devanter, the then Assistant Attorney General for the Interior Department, rendered the following opinion to the Secretary of the Interior reviewing the act of March 1, 1901:

"April 24, 1902.

"THE SECRETARY OF THE INTERIOR.

"SIR: The Department has held that under the agreement with the Creek Indians ratified by the act of March 1, 1901 (31 Stat., 861), Creek citizens may not rent the lands selected by them for allotments for a longer period than one year until deeds shall have been issued to them. It is now urged that this construction should not obtain, but that said agreement should be construed as authorizing the leasing of such allotments without restriction as to the length of the term, as soon as the selection has been made and certificate issued thereon, and the matter has been submitted for my opinion.

"Paragraph 37 of said agreement contains a provision as follows:

" 'Creek citizens may rent their allotments, when selected, for a term not exceeding one year, and after receiving title thereto without restriction' * * *

"Under that agreement each citizen was to receive an allotment of one hundred and sixty acres of land to be selected by him or for him in the manner prescribed therein and the principal chief was to execute, in due form, and deliver to each citizen so selecting an allotment, 'a deed conveying to him all right, title, and interest of the Creek Nation and of

all other citizens in and to the lands embraced in his allotment certificate.' This deed is to be approved by the Secretary of the Interior, which approval is to serve as a relinquishment of all right, title, and interest of the United States in the land described therein. The acceptance of the deed by the allottee is to be taken as an assent on his part to the allotment and sale of the lands of the tribe, as in said agreement provided, and as a relinquishment of all his right, title, and interest in and to the same, except in the proceeds of the land reserved from allotment. Not until such a deed is executed, approved, and accepted is the transaction completed and the title vested in the allottee. The completion of the transaction was evidently the point of time referred to in the expression 'and after receiving title thereto without restriction.'

"Upon making selection the applicant is given a certificate stating that he has selected the land described and this is the allotment certificate mentioned in the agreement. It is evidence that the person to whom it is given has selected an allotment. Thereafter, and until title passes to him, he may, under the first clause of paragraph 37, rent his allotment for a term not exceeding one year. Theoretically, the certificate would issue immediately upon the selection being presented and the provision permitting the renting of allotments must be read with this theory in mind. There would be no room for the operation of the first clause if the contention were correct that it refers only to the time between the presentation of a selection and the issuance of an allotment certificate. It may be that in administering this law it has been found advisable to delay the issuance of a certificate until it can be ascertained whether such selection should be allowed, but such delay would be too short to make a permission to rent during that time of any practical benefit to the allottee. That delay was not, however, contemplated by the agreement and therefore the fact that there is such a delay does not constitute a valid argument in support of the contention that the first clause of paragraph 37 relates to the period covered by it.

"I am of the opinion that the phrase 'after receiving title,' should be construed as referring to the time when title actually passes by the delivery and acceptance of the deed provided for in said agreement.

"The paper submitted is herewith returned.

"Very respectfully,

"WILLIS VAN DEVANTER,

"*Assistant Attorney General.*

"April 24, 1902.

"Approved:

"E. A. HITCHCOCK,

"*Secretary.*"

If, as held in the opinion of the Assistant Attorney General for the Interior Department, and by the Secretary of the Interior in the case of *Majors vs. Thompson, supra*, the Creek Nation could not divest itself of title, or the allottee be invested with title, until the delivery of the patents, then obviously the action of the Dawes Commission in arbitrarily allotting this land was of no validity, and was an attempt to produce the very result which actuated the Creek National Council in refusing to empower the Commission to allot any person other than those who selected their allotment, and was an attempt to undertake to convey title to a person who was clearly not entitled to receive it, because of the death of the allottee prior to April 1, 1899.

Counsel for the Creek Nation can understand how, as a matter of public policy, this court might now be urged to sustain allotments made to citizens of the Creek Nation where the citizen was living on April 1, 1899, and subsequently accepted the patent and went into possession of the land, for such an act might be construed as tantamount to a selection and acceptance of the allotment so set apart, which is true of practically all of the cases where the allottee was, in the first instance, entitled to an allotment. It is not believed, however, that the court will listen with tolerance to the contention that the Creek Nation is estopped

from asserting the invalidity of a conveyance where, as in this case, the allottee did not accept the deeds or go into possession of the land, being unable to do either because of his non-existence, and especially is this true where the Government, in behalf of the tribe, is offering to prove that the allottee was not living on April 1, 1899, and was, therefore, not entitled to receive an allotment.

The Work of the Commission to the Five Civilized Tribes.

The duties imposed upon the Dawes Commission were most arduous. Even a close and analytical study of the acts of Congress creating those duties will not fully disclose them. The Commission was charged with the work of enrolling citizens and allotting to them in severalty their respective shares of tribal lands. Seemingly, this was a simple undertaking. In fact, however, it proved not only complicated and difficult, just how complicated and just how difficult cannot be well comprehended and appreciated without some acquaintance with the official correspondence and reports of the Commission.

For purposes of review by this court, we have collated excerpts from this correspondence and these reports, and they will be found in the appendix to this brief. They relate to, and are indexed under, the following subjects:

A.

The Indians were opposed to the division of their lands in severalty and not only afforded no assistance to the Commission but obstructed its work in many ways.

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B.

Magnitude and diversified character of the work devolved upon the Commission to the Five Civilized Tribes.

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C.

The Creek tribal rolls were not dependable, and it was recognized by the Commission and the Creek authorities that much fraud attended the making of these rolls.

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D.

The Creek Indians and the Commission to the Five Civilized Tribes construed the provisions of the various acts of Congress and agreements as requiring the personal appearing before the Commission of all citizens seeking to have their names placed upon the rolls. (Barney Thlocco did not appear before the Commission to the Five Civilized Tribes to be enrolled, nor did any person appear for him. He was dead at the time, having died prior to April 1st, 1899.)

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E.

It was believed by the Commission to the Five Civilized Tribes and the Creek Indians that no person could be entitled to enrollment who was not enrolled prior to the ratification of the Original Agreement, which was ratified on May 25, 1901, and therefore unaccounted-for Indians (of whom Thlocco was one) were listed for enrollment before the ratification of this agreement.

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F.

Many persons were fraudulently or erroneously enrolled and allotted who were not citizens of the tribes, or who were not entitled to share in the tribal lands or funds.

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G.

In the instance of deceased enrolled and allotted citizens, it was the custom and practice of the Commission to issue patents to the heirs of the deceased, and not in the name of the deceased, thus recognizing the common law rule that a deed to a dead person is ineffective to convey title.

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Conclusion.

The law, treaties, and agreements, the mass of correspondence, the reports of the Commission to the Five Civilized Tribes and other official communications herein referred to show most convincingly that the Creek Indians were slow to agree to the appeals of the United States to give up a government they had established long before the discovery of America, and their common interest in an estate which had cost them so dearly and accept a new plan of government and of land tenure, because of their distrust in the sincerity of the expressed purpose of the Government to fairly and impartially partition their land and safeguard their interests after allotments were made.

They had but the precedent of broken treaties, pledges, and promises to encourage them to believe that the Government would impartially divide their property among those entitled to share in its distribution and would protect the individuals of the tribe in the enjoyment of their estates after such division had been made.

A brief period of only sixteen years has elapsed since the Creek Indians were persuaded to enter into the Original

Creek Agreement, looking to the allotment of their lands. Since that time more than 80 per cent of the Creeks have been deprived by acts of Congress of all governmental supervision, and at least 90 per cent of that number have disposed of all they had of this world's goods, including their proportionate share of the lands of their tribe, in whose traditions they once so gloried and prided themselves. The only satisfaction that can now be experienced by these honest old Indians, denounced at the time by the officers and agents of the Government as "snakes," enemies to the United States, is to point to a record of 70 years, during which time they had safeguarded the property and property rights of the tribe, and to the Government record of 16 years, during which most of their lands have passed to the possession of their more astute and avaricious neighbor, the white man, and to say, "I told you so." And yet in the face of this record, we find in this case an earnest appeal presented to this court to permit the confessed wrongful allotment of Barney Thlocco to stand as unassailable, and to hold the tribe of Indians, wards of the Government, estopped from showing that this Thlocco was not entitled to enrollment, because of the very acts and conduct of those same agents and officers of the Government. For more than a hundred years the white man has demanded, insistently and persistently, of the courts and governmental agencies, a construction of the laws most favorable to himself and his, but I believe that this is the first time that this court has been asked to bar, by application of technical rules, a tribe of Indians, helpless and dependent wards of the Government, from showing that they are entitled to property worth many millions of dollars, because of these estoppels, secreted in their agreements and couched in language which they did not understand and could not understand.

R. C. ALLEN,

Creek National Attorney,

JAMES C. DAVIS,

Ass't Creek Attorney,

Solicitors for the Creek Nation.

APPENDIX.

Book A, p. 165.

Telegram.

MUSCOGEE, I. T., 10, 13, 1897.

The Secretary of the Interior, Washington, D. C.:

We have made repeated requests in writing and personally for copies of Creek rolls and fail to get them. Have been at Okmulgee endeavoring to take census since 11th instant, but very few citizens appear after proper advertisement. We are informed that members of National Council now in session advise citizens to not enroll.

TAMS BIXBY,
Acting Chairman.

Copied from "Acts and Resolutions of the National Council of the Muskogee Nation, 1900; Compiled by A. P. McKellop."

Amendment of September 27, 1897—Reasons Why It Was Rejected by the Council.

Sec. 277. *Be it Resolved by the National Council of the Muskogee Nation:* That in view of the fact that the agreement or treaty entered into between the United States and the Creek Nation by commissioners duly authorized thereunto on the 27th day of September, 1897, was, by joint resolution of the National Council, rejected as unsatisfactory to the Creek people, it is deemed proper that the reasons for such rejection should be publicly stated.

The most powerful consideration which induced the Creeks to remove from their country east of the Mississippi to their present home was the fact that the United States guaranteed them the unrestricted right of self-government and the peaceable occupancy of this country until they shall of their own accord make such changes in their relations

to the United States as they may deem for the betterment of their condition. It is necessary to recite a few well-known portions of the treaties now existing between the Creek Nation and the United States in order that the public may properly understand the guarantees upon which we have so far existed as a self-governing Nation.

Art. III, Treaty of 1834. "The United States will grant a patent in fee simple to the Creek Nation of Indians for the land assigned said Nation by this treaty or convention whenever the same shall have been ratified by the President and Senate of the United States; and the right thus guaranteed by the United States shall be continued to said tribe of Indians so long as they shall exist as a Nation and continue to occupy the country hereby assigned to them."

Art. IV, Treaty 1856. "The United States do hereby solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians; and that no portion of either of the tracts of country defined in the first and second articles of this agreement shall ever be embraced or included within, or annexed to, any Territory or State; nor shall either, or any part of either, ever be erected into a Territory without the full and free consent of the legislative authority of the tribe owning the same." Art. XV of the same treaty guarantees to the Creeks, "the unrestricted right of self-government and full jurisdiction over persons and property within their respective limits, excepting, however, white persons with their property, etc."

"The United States and the Creek Nation had a wise, definite and benevolent policy" in the grant of these lands west of the Mississippi. That policy was to secure to the Creeks a country in which they could grow up into a civilized, self-governing, prosperous and Christian people through laws to be enacted by their tribal legislators and adjudged and enforced by their tribal courts. That the result of this policy would ultimately break up tribal government and end in the absorption of the Indians by the great body of the citizens of the United States is not denied.

The only and final question to be decided now is, has the time actually arrived when that policy can be consummated at once without detriment to the best interests of the Creek people? All other questions are subordinate and merely incidental to this one great question.

It is proper to recite briefly the history of the Creek people. Prior to the late civil war between the States the Creeks were farmers and herdsmen, and a very respectable portion of them were slave-holders. They lived an easy and rather careless life. Education was not deemed of such high importance then as now. This was also true of the slave-holders of the Southern States. When the civil war broke out our country was between the contending forces. The people, in self-defense, abandoned their homes and their property and fled, some joining the Union army and others siding with the Confederacy. Thus was our country completely abandoned and all our property became a prey to speculators who followed the two great armies solely for gain. At the close of the war when the Creeks returned home they found the country a vast wilderness. The stock had all been driven away, the houses and fences burned by prairie fires, and their former places of residence almost beyond recognition. Then began the struggle for existence. In a country without money, everybody as poor as his neighbor, and no railroads or towns to bring trade or produce market, the people were indeed pioneers.

For nearly ten years after the war there were no railroads nor towns in this Nation. There were, however, established a few neighborhood and two boarding schools, which afforded only a few children the opportunities of acquiring a very elementary knowledge of books. This was the condition in this Nation when in 1889 that portion of Oklahoma which formerly constituted the west half of the Creek country was sold to the United States, and of the proceeds of said sale two millions of dollars was deposited with the United States Government as a permanent fund, and fifty thousand dollars annually of the interest thereon was set apart as a school fund; and immediately thereafter there were erected large brick and frame school buildings, and the neighborhood schools were increased to thrice their former number. Out of a total annual income or revenue of one hundred and sixty thousand dollars, eighty-four thousand dollars of it is expended annually for educational purposes. Every child of school age has now the chance of acquiring an education absolutely free to himself and parents. It is not believed that this system of education can be replaced by one better suited to the Creeks.

There are in this Indian Territory five separate local

governments, neither one nor two of which can constitute a State sufficiently large to be admitted by Congress.

The movement toward a change of government in the Indian Territory should be simultaneous in all these Nations. Any treaty made with these Nations should be uniform in principle and equally protective of their various interests. The Indians will be the principal beneficiaries of any good that may result from a change of government, and they alone will suffer from the confusion and hardships which will necessarily follow the immediate breaking up of the tribal governments. The Congress of the United States has at no time been burdened with petitions from the great body of the white people in this country complaining of grievances or asking for the betterment of their condition; nor has any complaint gone up to Congress from the Indians of this Territory. It is therefore incomprehensible to our people why this great pressure should be brought to bear upon them for the breaking up of their government.

The Commissioners on the part of the United States have threatened to disrupt our government if we do not by treaty at once agree to allot our lands and surrender our right of self-government.

The Congress of the United States has passed an act (Indian Appropriation Bill, approved June 7, 1897) which, after January 1st, 1898, deprives this Nation of the jurisdiction guaranteed to it by treaties. With this flaming sword as an everlasting threat hanging over the Nation, as it were, by a single thread, the Creek Commissioners were induced to sign the Agreement of September 27, 1897. This is a repetition of the coercion under which the Creek Delegation signed the treaty of Ft. Smith in 1866 in which it was agreed for the Creeks to sell the west half of the whole Nation, amounting to three million acres, at thirty cents an acre. There might have been some slight excuse at that time in using coercive measures, but now, thirty odd years since the great civil war ended, we have the right to demand justice and fair play.

It has been announced to be the purpose and desire of the United States to protect the interests of the majority of the Indians by devising a plan for the allotment of lands and by their admission as citizens of the United States. Upon a thorough understanding of the intent and scope of the treaty as interpreted and explained by the Commissioners it was

rejected by a large majority of the members of the Council. No people can be accused of improper motives in an earnest desire to thoroughly consider their condition, and endeavor to stand by those principles of government which have brought them prosperity and contentment. In the position thus taken the Creeks rely upon the honesty and fair-mindedness of the Commissioners of the United States and the members of Congress.

Approved November 3, 1897.

Book B, p. 273.

MUSKOGEE, INDIAN TERRITORY, July 11, 1898.

Hon. Cornelius N. Bliss, Secretary of the Interior.

MY DEAR SIR: Your favor of the 7th inst., addressed to Commissioner McKennen, has been received. The Captain being absent in the field, I have the honor to reply briefly in his stead.

While it is undoubtedly true that under Section 19 of the Curtis Bill the United States is prohibited from making payments of any nature to the tribal governments in Indian Territory, except through the medium of an officer of the United States, I can see no particular reason for delay in making July payments, as none of them so far as I can ascertain, are in the nature of per capita distributions. None of the rolls, with the exception of that of the Seminole Nation, can be completed for several months; but of course the rolls are unnecessary in making the above mentioned payments because they are not per capita payments, and the officer to be designated by you will disburse the money to the individual creditor of the nation.

Admittedly, the enactment of the Curtis Bill will unsettle affairs in this Territory for some time to come, but future conditions cannot be worse than they have for years past, and out of the present inchoate state will certainly come law and order.

It is safe to say that the people will, to a certain extent, *unduly* complain of the present situation, but this is nothing new. Most of the leaders have always been unreasonable, and have persistently, in public and in private, hindered and hampered the work of the government from the beginning, so there is nothing to be lost in this direction.

We have received information directly from Mr. White,

Chief of the Indian Division, that he is coming to the Territory, as your representative, for consultation with the Commission, regarding matters pertaining to the Five Civilized Tribes and the existing situation. We shall be very glad to confer with him, and have no doubt that after due investigation along the lines proposed, your representative will become thoroughly informed as to conditions prevailing here, and will, upon his return to Washington, be able to advise you definitely as to the requirements of the situation.

We expect that Isparhecher, Chief of the Muskogee Tribe, will continue his factious oppositions. It is our intention, within the next few days, to make a formal demand upon him, in accordance with the provisions of Section 21 of the Curtis Bill, for the delivery of the Creek rolls. Undoubtedly the chief will refuse to comply with our demands. We shall then obtain an order from the United States Court, compelling immediate delivery. In event that Isparhecher continues obstinate, the Court will certainly order his arrest for contempt, and thus, immediately, the whole question of authority as between the United States and the Muskogee Nation, will be at issue.

We are advised that Mr. White will arrive at Muskogee Thursday morning of this week. Commissioners McKennon, Needles and myself will at that time be in the interior of the Creek Nation, at work upon the census. It is our intention, however, that one of the Commission, probably myself, will drive in from Okmulgee on Saturday of this week, for the purpose of meeting Mr. White and conveying him to the capital of the nation, where it is intended to hold a conference of the United States officials, including Agent Wisdom, interested in the work prescribed to be done by the Curtis Bill.

Very respectfully yours,
(Signed)

TAMS BIXBY,
Acting Chairman.

Book B, p. 432.

MUSKOGEE, INDIAN TERRITORY, Aug. 6, 1898.

The Honorable the Secretary of the Interior.

SIR: We have the honor herewith to submit for your information and consideration, a letter from Mr. S. T. Bledsoe of Ardmore, Indian Territory, in relation to the wrongful

occupancy of town lots, and other matters. You may remember that I introduced Mr. Bledsoe to you while in Washington as a party representing the town-site interests in the Choctaw and Chickasaw Nations. He is a perfectly reliable and honorable man and what he says is worthy of consideration.

We are informed that cattle men are securing leases of lands, especially from the negroes in the Creek Nation, on the open prairies which they claim to select as their allotments, but of which they have never taken possession, and in this way, the cattle men hope to secure a lease of pastures, thus evading the terms of the Curtis Bill.

We are engaged at work very earnestly on the Creek census and hope during this month to get same ready to make rolls of Creek citizens, as also rolls of Seminole citizens, but we find it a most difficult task, with many intricate and perplexing questions to determine. We have thus far had no help from the Creek Government, the old Chief refusing to give us any aid whatever. Some of the Town Kings, however, have given us assistance.

Judge Clayton came up a few days ago and opened Court and the District Attorney, on behalf of the Commission, asked for an order against Chief Isparhecher, requiring him to turn over to the Commission, the rolls and the records of the Council and of citizenship committees relating to Creek citizenship, and a Deputy Marshal was sent out, with our Secretary, Mr. Aylesworth, to serve the order, which was cheerfully obeyed by the Chief. This was the only way, however, we could induce him to act. We go into the Chickasaw Nation, the last of this month, and will there be engaged in the work of making rolls of Chickasaw citizens and of Chickasaw Freedmen, during the next six weeks thereafter.

The weather is very warm but the members of the Commission and its clerical force are standing the weather pretty well and are in good health.

Respectfully,

(Copy of Letter on p. 17 of Book 36.)

MUSKOGEE, INDIAN TERRITORY, January 23, 1901.

The Honorable the Secretary of the Interior.

SIR: Following is a copy of a dispatch sent you this day:

"United States Marshal here has telegraphed Attorney General, and Indian Agent has telegraphed Indian Commissioner, giving particulars of continued lawless conduct of Snake band Creeks resisting processes and policy of the Government. This is substantially confirmed by verbal communication of office of Chief Porter. Commission has deemed it necessary to detain five appraising parties about entering disturbed district until order is restored, believing it dangerous to life and property, and strongly advises that an exhibition of military force, say one company of cavalry, be made in district. Believe if this is done without delay it will restore normal conditions."

While the Commission has not, by its own agents, made an investigation of the conditions which exist in the region reported to be terrorized by outlaws, it has sufficient reliable verbal information, secured through the office of the United States Marshal, the United States Indian Agent and citizens who have been in that locality, to well assure it that it would be unsafe for its appraisers to enter the section of country infested by the followers of "Snake."

It has, therefore, directed its appraisers who are about entering the Creek Nation on the south, to await further advices from this office.

It is believed that a military display in the country now occupied by the Snake band of Indians will serve to re-instate order, and that the Commission's employees may thereupon at once proceed to their duties.

Very respectfully,

TAMS BIXBY,
Acting Chairman.

(Book 4, p. 95.)

MUSKOGEE, INDIAN TERRITORY, March 25, 1902.

The Honorable the Secretary of the Interior.

SIR: The Commission has arranged to send out into the Cherokee Nation four lightly equipped enrolling parties

commencing April 14, and continuing to the end of June, as per list of appointments herewith enclosed. They will visit the remotest sections of the Nation, the object being to secure the enrollment of the reluctant and obscure full bloods; and there will be with them representatives of the Indian Inspector's Office, with considerable sums of specie to make payments of relief funds. Also information continues to reach the Commission that some of the obstructive Cherokees are continuing to tell the ignorant full bloods that the Commission has no authority to do the work upon which it is engaged, and is not backed therein by the United States Government.

In view of the circumstances stated, and knowing the credulous and impressionable character of the ignorant full bloods, in regard to claims relating to their traditions, the persistent hostility of certain parties, and the fact that the presence of troops is the only evidence of the purpose of the Government that many of those people will readily believe, the request is made that a sufficient number of cavalry be sent to Fort Gibson before April 14th, to enable say eight or ten men to accompany each of the four parties, and yet leave a small squadron of, say, twenty men at Fort Gibson for contingencies.

The Department's prompt attention to this matter is respectfully urged.

Respectfully,

	— — — — —,	<i>Acting Chairman.</i>
(Signed)	T. B. NEEDLES,	<i>Commissioner.</i>
(Signed)	C. R. BRECKENRIDGE,	<i>Commissioner.</i>

Through the Commissioner of Indian Affairs.
1 inclosure. MB-2.

(Book 4, p. 168.)

(Telegram.)

Paid Gov't.

MUSKOGEE, I. T., April 8, 1902.

Secretary of Interior, Washington, D. C.:

Four enrolling parties will attempt to enroll full-blood Cherokees, commencing April fifteenth. They will be in full-blood neighborhoods, where disorder and organized and bitter opposition to enrollment prevails. We think they should be protected from violence and intimidation, and valuable Government records from danger of destruction. Otherwise these parties should not be sent out. We urgently advise that a company or more of United States cavalry be placed at our disposal at once in order that a squad may be with each party and the power and authority of the Government be displayed to these people. Mr. Bixby absent. Please answer.

NEEDLES, *Commissioner in Charge.*
BRECKENRIDGE, *Commissioner.*

O. B. G. R.

Book A, p. 277.

MUSKOGEE, INDIAN TERRITORY, December 4, 1897.

The Honorable the Secretary of the Interior.

SIR: I have the honor to report that the Commission for a month or more, has been engaged in taking a census of Creek citizens, finding this course necessary since the Creek authorities refuse to furnish to the Commission, copies of their rolls, and such copies, if furnished, would not, of themselves, afford the means of making correct rolls of Creek citizenship, and such as will be required in dealing with the Creek people in their changed conditions as contemplated by the United States Government. Since orders were issued by Hon. D. M. Wisdom, pursuant to your instructions, requiring the Creek people to appear before the Commission for enrollment, they have manifested a disposition to obey, and about 11,000 have been enrolled to date. It is thought the enrollment, when completed, will reach

at 15,000. Members of the Commission think this work, in hand, should be pressed to completion, and rolls made as early as possible. No provision, so far, has been made by the tribal authorities to furnish any assistance to the Commission in this work, and they refuse, not only to furnish copies of their citizenship rolls, but refuse to permit the Commission to make copies of them, without expense to the Creek Nation. The members of this Commission hope, however, to make rolls, whether aided by them or not, which will be more nearly correct than any rolls possessed by them, and citizens, as we are informed, have been arbitrarily dropped from the Creek rolls, and many added thereto without right of authority.

We have no information yet as to the result of the vote of the Chickasaw people on the Choctaw-Chickasaw agreement, at the first instant.

The exhaustive and very able opinion delivered by Judge Coker on Cherokee citizenship yesterday, which is concurred in by Judge Thomas, fully and in every particular sustaining the Commission in its rulings and judgements on applications for such citizenship, rendered in 1893, will doubtless have a very good effect and will materially aid in the future work of adjusting affairs here. It certainly, for the present, puts at rest the vexatious question of citizenship in the Cherokee Nation.

It will unquestionably be necessary that some very clear and definite legislation be passed at the ensuing session of Congress affecting the several tribes in this Territory, and the presence of the Commission in Washington, will, as heretofore, doubtless be desired by the Chairman of the Indian Committees of the Senate and House, and we respectfully suggest that the Commission be not called to Washington until after the holidays, as little will be done by Congress until after that time, and the members of the Commission can be profitably employed here.

Very respectfully,
(Signed)

TAMS BIXBY,
Acting Chairman.

Book K, p. 315.

MUSKOGEE, INDIAN TERRITORY, June 15, 1899.

The Honorable the Secretary of the Interior.

SIR: I have the honor to acknowledge the receipt of a letter from the Department, under date of June 7th, pertaining to the establishment in the Cherokee, Choctaw and Chickasaw Nations, of offices for the selection by individual Indians of their prospective allotments, in which it is stated that a single set of photolithographic township plats of the Chickasaw Nation will be forwarded to the Commission at once, and that upon the return to Washington of the Director of the Geological Survey, a complete set, with his signature will be forwarded, in addition.

It is further stated that

"It is not perceived that any serious obstacle prevents the selection of prospective allotments by members who are unquestionably upon some rolls, and whose citizenship is not denied. While the Department must rely to a great extent upon the enlightened judgment of the Commission, yet the suggestion is repeated that it is very desirable that the Individual Indians should have an opportunity of selecting places for their prospective homes, under the provisions of said regulations."

In view of the report heretofore made by this office on the subject, it is not believed that the Department desires that the Commission reaffirm its sincerity of purpose or belief in the impracticability of immediate action in the direction indicated. It is doubtful if a complete and full understanding of the situation in its various phases could be conveyed to the Department through the medium of a correspondence, and without an intelligent understanding of the work in all its details, it is questionable if the impracticability of entering upon this work at the present time can be made clear.

Referring, however, to the statement of the Department above quoted, that

"It is not perceived that any serious obstacle prevents the selection of prospective allotments by members who are unquestionably upon some rolls, and whose citizenship is not denied."

I desire to again respectfully call attention to the fact that

were the Commission at the present time to open offices in the Choctaw and Chickasaw Nations for the selection of homesteads, it would be absolutely without a record pertaining to the citizenship of these nations, the tribal rolls and records made by this office being required by this Commission in its enrollment work in the Choctaw Nation. (See our letter May 27th.) The Commission would therefore be unable to verify applicants' statements as to their names appearing on tribal rolls. Even were a tribal roll available at this time, it does not follow that a person would be entitled to make selection simply because his name appeared on some tribal roll; indeed, many instances are known where persons, without a shadow of a right to enrollment, are recognized citizens and enrolled as such. The data heretofore taken by this Commission in the field is essential in the identification of citizens.

Again, before this duty can be entered upon, it is necessary to transcribe the areas from township plats to diagrams prepared for that purpose, in order that a proper record may be made and kept, as the work progresses. These diagrams will be prepared as soon as the township plats are received, and sufficient clerical assistance can be employed therefor.

Equally cogent reasons exist for deferring the opening of an office in the Cherokee Nation for the selection of allotments. A plan for the prosecution of our work there, however, is under consideration, and will be outlined to the Department in due time.

The fact should not be overlooked that a work equal in proportions and intricacies to that devolving upon this Commission, is susceptible of successful execution only when thoroughly systematized and intelligently directed. The Commission is fully acquainted with existing conditions, has studied the situation and has evolved a general plan for carrying on the work of allotment in its preliminary stages, which has received the approval of the Department. With a proper and vigorous management of details this plan will, in my judgment, accomplish results creditable to the Commission, satisfactory to the Department and equitable and just to the Indians. Before the preliminary work of allotment can be entered upon, certain preparation must be made. A haphazard, unstudied and imperfect method of procedure is incompatible with this plan.

Nevertheless, the Commission is not wedded to any plan

to the exclusion of another, but will cheerfully adopt any method which promises better results, if the Department has such to offer.

Very respectfully,

TAMS BIXBY,
Acting Chairman.

Through the Commissioner of Indian Affairs.

(Book 19, p. 360.)

MUSKOGEE, INDIAN TERRITORY, May 16, 1904.

The Honorable the Secretary of the Interior.

SIR: We have the honor to call your attention to the fact that the last Congress failed to make any provision for the final closing of the citizenship rolls of the Creek Nation, notwithstanding the provision in the Indian Appropriation Act approved April 1, 1904 (Public No. 125), that "said Commission shall conclude its work and terminate on or before the first day of July, 1905, and said Commission shall cease to exist on July 1, 1905."

On January 6, 1903 (I. T. D. 7345-1902), the Department held, relative to Section 28 of the Creek Agreement approved March 1, 1901 (32 Stats. 861), that the rolls of citizenship of the Creek Nation to be prepared by the Commission were not closed under the provisions of law above referred to, and that the Commission was to receive the applications and enroll as citizens of said nation persons who had theretofore been recognized by the tribe as such, notwithstanding that no application had been made by such citizens before the Commission for their enrollment prior to the ratification of said agreement by the Creek tribe.

There are on the tribal rolls of citizens and freedmen of the Creek tribe in the possession of the Commission, about 4500 names of persons who have never applied to the Commission for enrollment, and concerning whom no definite information can be obtained, although special and painstaking effort has been made for the past six months to locate them. It is our opinion from information obtained that nearly, if not all, of these names so listed on the tribal rolls are the names of persons who died prior to April 1, 1899, or are enrolled on the tribal rolls under some other name, or

have removed from the Creek Nation and been enrolled with some other Indian Tribe, or have taken up a residence in some foreign country.

It is considered that applicants for enrollment as citizens and freedmen of the Creek Nation have had sufficient time in which to make application for their enrollment under the Act of Congress of June 28, 1898 (30 Stats., 495), March 1, 1901 (31 Stats., 861), and June 30, 1902 (32 Stats. 500), and unless some limit is placed upon the time within which applications for enrollment will be received, the work of preparing these rolls will be interminable.

The Indian Appropriation Act approved March 3, 1901 (31 Stats. 1073), provides as follows:

"The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent; and the Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes, or either of them, for closing said rolls, but upon failure or refusal of said tribes or any of them to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no name shall be added thereto."

This authority has not been withdrawn or modified in any way by any subsequent legislation, and as no time has been fixed by agreement with the Creek tribe for the closing of the rolls of citizenship of said tribe it is considered necessary that some action be taken by the Department for the final closing of said rolls.

We therefore recommend that an order be issued by the Secretary of the Interior under the authority of law above quoted directing that the rolls of citizenship of the Creek tribe prepared by the Commission be closed on July 1, 1904, and that the application of no person whomsoever for enrollment as a citizen or freedman of the Creek Nation be received by the Commission after said date.

Respectfully,

(Signed.)

TAMS BIXBY.

(Signed.)

T. B. NEEDLES.

(Signed.)

C. R. BRECKINRIDGE.

Commissioners.

Through the Commissioner of Indian Affairs.

Book 826, p. 367.

MUSKOGEE, INDIAN TERRITORY, January 31, 1907.
Chief Clerk Creek Enrollment Division, General Office.

DEAR SIR: For the information and guidance of the clerks in the Creek Enrollment Division engaged in the preparation of decisions and orders in enrollment cases, your attention is directed to the following instructions which will hereafter govern such work.

Orders dismissing applications for enrollment will be prepared in all cases where the evidence submitted is *clear* and *uncontroverted* that any one of the following facts are true:

First. That the applicant died prior to April 1, 1899.

Second. That the applicant was born subsequent to April 1, 1899, and died prior to July 1, 1900.

Third. That the applicant was born subsequent to July 1, 1900, and died prior to May 25, 1901.

Fourth. That the applicant was born subsequent to May 25, 1901, and died prior to March 4, 1905.

Fifth. That the applicant was born subsequent to March 4, 1905, and died prior to March 4, 1906.

Sixth. That the applicant was born subsequent to March 4, 1906.

The order of dismissal in the cases above referred to will be prepared for the signature of the Commissioner in the following form:

In view of the foregoing, I am of the opinion that there is no authority of law for the enrollment of ——— as a ——— of the Creek Nation, and the application for his enrollment as such is accordingly dismissed.

These orders when signed by the Commissioner will be served upon the applicants or their attorneys, but will not be forwarded to the Department for its approval except in specific cases wherein appeal may be prayed for by the applicants themselves.

Orders dismissing will also be prepared in all cases where, at the time of the filing of the application, the Commissioner had no authority of law for the reception of the same. The order used in such cases will be as follows:

I am therefore of the opinion that no application having been made for the enrollment of _____ as a _____ of the Creek Nation prior to _____, I am now, under the provisions of the act of Congress approved _____ without authority to receive or consider this application for his enrollment, and the same is accordingly dismissed.

These cases will not be sent to the Department unless the date of the filing of the application with the Commissioner is in controversy and there is conflicting testimony or evidence on this point.

There are also certain names listed on old census or field cards or by information, which were so listed by the Commission to the Five Civilized Tribes simply for the purpose of protecting the rights, if any, which certain persons might have whose names appear upon the Creek tribal rolls and for whom no application had been made. In these cases diligent inquiry has been made for many years through letters addressed to the applicants themselves or to other persons who might know of their whereabouts and by field parties operating throughout the Creek Nation, and we have been unable to obtain any information relative to such persons. It will be necessary to take some action disposing of these cases, and an order dismissing in the form which has heretofore been furnished you will be prepared. It will not be necessary in these cases that the order or record be sent to the Department.

In all contested cases where the weight or preponderance of the evidence shows that the applicants come within any one of the classes first above referred to, decisions will be prepared *denying* such applicants, which, when signed by the Commissioner, will be served upon the parties interested or their attorneys, and said decisions, together with the records in the case, will be transmitted to the Department for its consideration.

In all cases where the applicant is found to be entitled to enrollment the usual procedure will be followed, that is, the decision will be served upon the attorney for the Creek Nation or his representative, and the applicant or his attorneys, and in the event the attorney for the Creek Nation files protest, the decision, together with the record in the case, will be sent to the Department, otherwise, protest being waived, the

names of the applicants when found entitled to enrollment will be placed upon a schedule to be transmitted to the Department for its approval.

From the above it will be seen that the distinction to be made between cases in which orders dismissing are to be prepared and those in which decisions denying the applicants are to be prepared is as follows:

Orders dismissing will be prepared in all cases in which the evidence is *clear* and *uncontroverted* that the applicant is not entitled to enrollment by reason of not being in existence on one of the dates required by legislation affecting enrollment of citizens and freedmen of the Creek tribe. Also in cases where applications for the enrollment of applicants were not received by the Commissioner within the time prescribed by law. Also enrollment cases where the parties have been listed from information or from the tribal rolls and no testimony or evidence has been obtained relative to their rights.

Decisions denying the applicants will be prepared in all cases where there is conflict in the evidence, and it is necessary to make a finding of fact on the weight or preponderance of evidence submitted.

Respectfully,

TAMS BIXBY,
Commissioner.

F. E. L.

Book A, p. 45.

— Tams Bixby.

FORT GIBSON, I. T., Oct. 6th, 1897.

John G. Leeber, Esq., Att'y at Law, Muskogee, I. T.

DEAR SIR: All persons entitled to enrollment as Creek Citizens, whether admitted by this Commission or having application for enrollment now pending or otherwise entitled to be enrolled ought to meet us and make application to have their names put on the rolls. This is in answer to your communication of the 5th inst. just received.

Respectfully yours,
(Signed)

TAMS BIXBY,
Acting Chairman.

Book A, p. 163.

(Copy.)

MUSCOGEE, I. T., Nov. 1, 1897.

Hon. Secretary Interior, Washington, D. C.:

The Commission respectfully requests that the Indian Agent at Union Agency be ordered by wire to exercise his authority in aid of the Commission in taking a census and making rolls of Creek Citizens by securing for its use copies of rolls now existing and by ordering all members of the tribe to appear before the Commission for enrollment at Muscogee and at such other places as the Commission may select and to further aid the Commission from time to time as may be deemed necessary and expedient.

TAMS BIXBY,
Acting Chairman.

Off. Business.
Govt. Rate.
Collect.

Book A, p. 156.

MUSCOGEE, INDIAN TERRITORY, November 4, 1897.

Everline Williams, Wybark, Ind. Ter.

DEAR MADAM: Inclosed you will find census notice, showing time and place at which this Commission will appear to hear applications for enrollment in the Creek Nation. You should make application at the nearest point to you.

Yours truly,
(Signed) A. L. AYLESWORTH, *Secretary.*

L. R. S.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, October 25th, 1898.

Hon. Henry L. Dawes, Chairman of the Commission to the Five Civilized Tribes, Pittsfield, Mass.

SIR: Inclosed herewith you will find a letter from John O'Donnell, dated Baum, I. T., Oct. 17th, 1898, which is referred to your Commission for its consideration and appro-

priate action. While it does not appear from his letter just when said O'Donnell was rejected by the Commission, it may be proper to state that in all cases which have been or may be considered by the Commission under the "Curtis Bill," the evidence in each case should be preserved, in order that when the rolls are presented to the Secretary for approval, should the ruling of the Commission be contested in any case, the evidence therein can be presented to and considered by the Department.

Respectfully,

C. N. BLISS, *Secretary.*

Ind. Ter. Div.

685—1898.

Incl.

Book D, p. 263.

MUSKOGEE, INDIAN TERRITORY, November 9, 1898.

S. W. Brown, Esq., Wealaka, I. T.

DEAR SIR: In reply to yours of November 2nd. All of your people who have not been enrolled should come to our office here and enroll. We are glad to know that the Euchees were alive to their interests and voted for the treaty. We are not yet informed as to what has been done about the matter, but should regret to see it defeated, as we think it would be better for the Creek people if they should ratify it.

Very truly yours,

(Signed)

A. S. McKENNON,
Commissioner.

(Copy of Letter on page 10, in Book "G.")

WUSKOGEE, INDIAN TERRITORY, February 14, 1899.

Mr. Edmond Beames, Bokchito, Indian Territory.

DEAR SIR: Your letter of February 10, relative to your citizenship, has been received.

Your property rights will depend, of course, upon your enrollment. In determining your citizenship, this Commission will be governed by the blood and citizenship of your mother.

This, however, will require a personal investigation, and

we would suggest that you personally appear before this Commission at one of its appointments in the Choctaw Nation during the coming summer. A list of these appointments is herewith enclosed.

A special session will be held at South McAlester, beginning March 20, next, and if convenient, you might appear there, and the matter of your citizenship will be taken up.

Yours truly,

T. B. NEEDLES,
Commissioner.

Book "M," page 63.

MUSKOGEE, INDIAN TERRITORY, July 28th, 1899.

Wyatt S. Hawkins, Esq., Limestone, Indian Territory.

MY DEAR SIR: Your letter 17th instant, was forwarded to me and I received it in Washington recently, but had no opportunity of answering until I could get back to the office, and returned only to-day.

The recent instructions of the Secretary of the Interior require that each person shall appear before the Commission for enrollment, and I hope, therefore, that it will be convenient for you and Mr. Baker to appear before us at one of our appointments in the Choctaw Nation, a list of which I enclose.

With very kind regards to you and all other friends with you, I am,

Very truly yours,

A. S. McKENNON,
Commissioner.

Enc.

Book "M," page 395.

MUSKOGEE, INDIAN TERRITORY, August 15, 1899.

R. J. Scott, Esq., Sallisaw, Indian Territory.

DEAR SIR: Your letter of August 7th, addressed to the Hon. Secretary of the Interior has been referred to this Commission. You state that you and your family are Cherokee citizens and that you desire to visit California for the benefit of your health, and inquire if you will forfeit your citizenship by so doing.

This Commission would not regard a temporary absence from the Territory as a relinquishment of citizenship, when occasioned by necessity, although a permanent removal would forfeit rights of citizenship. The most serious feature of such a change of residence as suggested by you is, in the view of this Commission, the possibility of your not being here for enrollment; the Commission is required to enroll citizens upon their personal application. Enrollments cannot be made by proxy, nor by written application; neither can they be made through an agent, except in extreme necessity.

R. J. Scott—2.

The Commission expects to enter upon the work of making the Cherokee rolls within a few months, and the allotment of lands will immediately follow and, if you can avoid leaving the Territory without endangering your health, until such matters are settled, it will doubtless be wise for you to do so.

Under the Rules of the Secretary of the Interior a citizen can make a rental contract for only one year.

Yours truly,
(Signed)

TAMS BIXBY,
Acting Chairman.

Book N, p. 102.

ATOKA, INDIAN TERRITORY, August 28, 1899.

L. D. Horton, Esq., Durant, Indian Territory.

DEAR SIR: In reply to yours of the 19th inst. in which you make a statement of the facts in several cases and asked to be advised whether or not persons will be enrolled under such given state of facts. The Commission cannot undertake to determine any case until the applicant has appeared before it and made his statement under oath of the facts of his case. It will then either enroll him or not. This course is required by late instructions from the Secretary of the Interior.

Very truly yours,
(Signed)

A. S. McKENNON,
Commissioner.

Book N, p. 362.

SOUTH McALESTER, I. T., Sept. 11, 1899.

Mrs. Grace M. Pitchlyn, Caddo, Ind. T.

DEAR MADAM: We have your favor of September 10th enclosing certain papers with request to file same in the case of your application for enrollment as a citizen of the Choctaw Nation. Herewith you will find the same returned to you, as it is the rule of this Commission to file no papers or affidavits similar to these. It will be necessary, if you desire to make further proof as to your rights in the premises, for you to appear before the Commission in person, with such witnesses as you may desire. This Commission will be in continuous session at Muskogee for an indefinite period after we leave our last appointment at South Canadian which closes on the 16th instant.

Very respectfully,
(Signed)

T. B. NEEDLES,
Commissioner.

Enclosure.

Book N, p. 361.

SOUTH McALESTER, I. T., Sept. 11, 1899.

Mr. H. B. Lockett, Duncan, I. T.

DEAR SIR: Enclosed you will find the papers sent us by you in regard to the application of Oza Nichols for enrollment.

The law requires all applicants to appear in person before this Commission, consequently it will be necessary for Mrs. Nichols to appear before us if she desires to be enrolled as a Choctaw citizen. We will be at South Canadian Sep. 14th to 16th inclusive, after that for an indefinite period at Muskogee.

Very respectfully,
(Signed)

T. B. NEEDLES,
Commissioner.

Enclosure.

Book N, p. 433.

SOUTH CANADIAN, IND. TERR., Sept. 15, 1899.

Mrs. Jacob Russell, Spiro, Indian Territory.

DEAR MADAM: In reply to your letter of September 7th, 1899, in which you refer to the refusal of the Commission to enroll you as an intermarried citizen, you having intermarried with a white person who had once intermarried with an Indian, and referring to your letter to the Secretary of the Interior and his reply to you as to the instructions given by him to the Commission. We have to say that the instructions require that each applicant appear in person before the Commission to be examined under oath, and their statements taken down by the Commission. If you are not already satisfied with the action of the Commission, and it did not make a record of your statements, you can, if you wish, appear before the Commission at any time at Muskogee, and it will make the record required by the rules of the Secretary of the Interior.

Very truly yours,
(Signed)

A. S. McKENNON,
Commissioner.

Book N, p. 425.

MUSKOGEE, INDIAN TERRITORY,
September 19, 1899.

Mrs. Miles, Box 17, Wilburton, Indian Territory:

I am in receipt of your letter of September 6 asking if your husband can be identified by a Choctaw, and stating that, if not, you will go to the Cherokee Nation and secure some one. This Commission is unable to determine from your letter what you desire to accomplish. It does not appear from your statement in which Nation citizenship is claimed or who the claimant is. If you or your husband is a member of either one of the Five Civilized Tribes it will be necessary for you to appear before this Commission in person for enrollment; your right thereto can only be determined upon an oral examination. If citizenship in the Cherokee Nation is claimed no steps need be taken by you at present for the reason that the enrollment of the Cherokees has not yet been reached by the Commission. This duty will be en-

ed upon, in all probability during the early part of next
 ar, and appointments will be fixed throughout the Chero-
 e Nation at which citizens may appear for enrollment. If,
 the other hand, citizenship is claimed in the Choctaw
 ation it will be necessary for applicants to appear before
 e Commission at an early date. This can be done at any
 e during the present month at Muskogee, but if it is more
 nvenient for you to appear at Tushkaherma you may do
 during the session of the Choctaw legislature in the month
 October, at which time the Commission will be in session
 ere also.

Yours truly,
 (Signed)

TAMS BIXBY,
Acting Chairman.

Book R, p. 90.

MUSKOGEE, INDIAN TERRITORY,
 November 22, 1899.

on. D. M. Hodge, Chairman, Okmulgee, Indian Territory.

DEAR SIR: I am in receipt of your letter of November
 1st, in which you state that the Council is preparing to
 ke a census of the citizens of the Creek Nation, and request
 at there be forwarded to you a blank such as is used by
 e Commission in enrollment work, as a guide, also a blank
 f the form used by the Commission when citizens make ap-
 plication for an allotment.

In response to your letter I have to state that any census
 r citizenship roll or list which might be prepared by the
 ribal authorities of the Creek Nation, would not be recog-
 ized by the Government of the United States, and the Com-
 mission cannot lend its aid to any undertaking which con-
 emplates the disbursement of tribal funds for that purpose.

The blank "application for allotment" can be used only
 t the land office of the Commission, and would be of no
 alue in the hands of citizens otherwise.

Yours truly,
 (Signed)

TAMS BIXBY,
Acting Chairman.

Book R, p. 436.

MUSKOGEE, I. T., December 4, 1899.

Edward Ross, Esq., Oakrey, I. T.

DEAR SIR: Your letter of November 30th is received. The Commission is unable to determine whether Bettie Grayson is entitled to enrollment in the Creek Nation until she personally appears before the Commission for examination. If her name appears upon the tribal rolls she should come to Muskogee and give such information as will enable the Commission to determine whether she is eligible to enrollment or not.

Yours truly,
(Signed)

TAMS BIXBY,
Acting Chairman.

Book R, p. 419.

MUSKOGEE, I. T., December 4, 1899.

Frank Carolina, Esq., Oakrey, I. T.

DEAR SIR: Your letter of November 30th is received.

Application for enrollment cannot be made by mail. If you and your family are entitled to enrollment in the Creek Nation it will be necessary for you to appear before the Commission in Muskogee for that purpose. If you are not a recognized citizen and duly enrolled on tribal rolls it will be useless for you to make the trip to Muskogee as the Commission has no authority to consider original applications for citizenship. If you desire any further information it will be given you on application.

Yours truly,
(Signed)

TAMS BIXBY,
Acting Chairman.

(Copy of Letter on Page 53, Book "U.")

MUSKOGEE, INDIAN TERRITORY, December 23, 1899.

J. W. Lasiter, Esquire, Alvord, Texas.

DEAR SIR: Your letter of December 20th is received, asking if you have been enrolled by this Commission as a Chero-

citizen. In response to your inquiry, you are informed the Commission has not yet reached the work of making roll of Cherokee citizens, and your right thereto cannot, therefore, be determined at this time. The Commission expects to take a census of Cherokee citizens early next year, and persons entitled thereto will be required to appear before the Commission for oral examination upon which their rights of enrollment will be determined.

I may state, however, for your information and protection, that if your name does not appear on the tribal rolls, and if you are not recognized as a citizen of that tribe, it is now too late for you to participate in the distribution of tribal property. Only those can be enrolled whose right to citizenship has heretofore been established.

Yours truly,

TAMS BIXBY,
Acting Chairman.

A.

(Copy of Letter on Page 97, Book "U.")

MUSKOGEE, INDIAN TERRITORY, December 23, 1899.

M. Wood, Esquire, Boggy Depot, Indian Territory.

DEAR SIR: Your letter of December 21st is received. You inquire whether you may yet be enrolled as a citizen of the Cherokee Nation, stating that you were ill at the time the Commission was taking a census.

In response to your letter, you are informed that the Commission has not yet entered upon the work of making a roll of Cherokee citizens. The plans of the Commission at present are to enter the Cherokee Nation next spring, and all Cherokee citizens will be required to appear in person and give the necessary information to enable the Commission to determine whether they are entitled to enrollment. The dates and places for such hearings have not yet been fixed, but due notice thereof will be given through the newspapers and otherwise.

I may add, however, that if you are not now a recognized citizen of the Cherokee Nation and enrolled by the tribe as such, the mere fact that you possess Indian blood would not entitle you to enrollment. Neither this Commission nor any

other tribunal has now authority to hear and determine original applications for citizenship.

Yours truly,

TAMS BIXBY,
Acting Chairman.

(Copy of Letter on Page 191, Book "U.")

MUSKOGEE, INDIAN TERRITORY, December 27, 1899.

Janetta Grounds, Okmulgee, Indian Territory.

DEAR MADAM: Referring to your letter of October 31st, which was received at this office December 21st, and also in response to your letter of December 26th, received this day, I have to inform you that the article referred to in the *Globe-Democrat* does not in any way affect your right or the rights of your children to enrollment. From the information which the Commission has been able to secure, it appears that you are entitled to enrollment as a citizen of the Seminole Nation, and it will therefore be necessary for you to appear before the Commission and make application for enrollment. You should do this during the month of February next at Muskogee.

Yours truly,

TAMS BIXBY,
Acting Chairman.

(Copy of Letter on Page 107 in Book "V.")

MUSKOGEE, INDIAN TERRITORY, January 4, 1900.

Mr. E. P. Scott, Paris, Texas.

DEAR SIR: Your letter of January 1st is received. You state that some Choctaw Freedmen, also four Choctaw Indians, have applied to you for information with reference to enrollment. These persons, if entitled to enrollment, will be required to appear before the Commission in person for oral examination, upon which their rights will be determined. The Indians cannot be heard in an original application for citizenship; that is to say, if their names do not appear upon the tribal rolls, and if they are not recognized citizens of the Choctaw Nation, the Commission has not authority to enroll

hem, and any time or money which they might expend in an effort to secure such a status would be wasted. If they are recognized citizens of the Choctaw Nation, their names may be reported to the Commission, with their places of residence, and proper steps will be taken by the Commission to see that they are enrolled. The Commission cannot, of course, determine whether the Freedmen are eligible to enrollment without an examination.

Yours truly,

TAMS BIXBY,
Acting Chairman.
A.

(Book 7, p. 263.)

Special Dispatch to *The Times*.

WASHINGTON, D. C., April, 1900.

The insertion in the Indian Appropriation Bill of a paragraph conferring upon the Dawes Commission final jurisdiction in all citizenship cases in the Indian Territory, promises to result in a pretty contest between the Secretary of the Interior Hitchcock and Mr. McKennon, of the Dawes Commission.

As already stated in these dispatches, the Indian Committee of the Senate, at the request of Mr. McKennon, inserted an apparently harmless provision in the Indian Appropriation Bill, under the guise that it would expedite and facilitate the settling up of affairs in Indian Territory, but which, in effect, changes the entire order of affairs in contested citizenship cases and deprives the Secretary of the Interior of all authority vested in him by the Curtis law and other statutes. When the provision referred to was incorporated in the bill, no member of the committee contemplated that so innocent appearing paragraph could have such a far-reaching effect. The action was taken at the request of Mr. McKennon, who insisted at the hearing before the committee that such a provision was necessary to properly expedite the citizenship cases in the Territory. When the full meaning of this provision became known, however, it created a sensation.

Secretary Hitchcock, who is familiar with the charges against the Commission in the adjudication of these cases,

has in the past year, been compelled on several occasions to severely reprimand the members of the Commission for their assumption of authority in power. The fight commenced last spring when the Dawes Commission refused to obey the instructions of the Interior Department in making records of all citizenship cases presented to them, in order that the Secretary might have opportunity for final review. Their refusal on that occasion resulted in the issuance of a stinging rebuke which the members of the Commission have never forgotten, and which today, is like a festering thorn in their sides. Secretary Hitchcock has at all times insisted that in the settlement of these disputed questions of citizenship, which involved the homes of the people of Indian Territory, that they should receive the most careful consideration, and be subject to the closest scrutiny, not only by the Commission, but by the Department, acting as a final court of review to insure absolute justice to all. This idea was not in consonance with the plans of the Commission, which body has at all times, objected to any person or tribunal reviewing their decisions. Accordingly, they carried their case to Congress and under the guise of expeditious legislation secured the insertion of the paragraph above referred to, which, if accepted, would tie the hands of the Department and the courts.

Secretary Hitchcock, however, does not propose to have the Dawes Commission, who are his subordinate officials, thwart his wishes and instructions and tie his hands, without a contest. Accordingly, he has accepted their challenge and entered the fight in earnest. In a letter written to a member of the Senate Committee on Indian Affairs in answer to certain questions, Secretary Hitchcock says:

"You request an expression of opinion from me upon the following points:

1. Do its provisions deprive the Interior Department of its revisory power over the rolls prepared in the first instance by the Dawes Commission?

2. Does it change the laws or affect the rulings of court under which names have already been placed upon the rolls by the Dawes Commission, and are entitled to be so placed?

3. Will it make the action of the Dawes Commission final and conclusive?

4. In so far as the provisions refer to the Missis-

Mississippi Choctaws, is it limited in its action to the Mississippi Choctaws remaining in Mississippi, or does it include the Mississippi Choctaws who have of recent years moved into the Indian Territory?

5. Will it finally deprive of all rights of citizenship in the Cherokee Tribe persons who have by the findings of masters been entitled to be placed upon the rolls, but who have not been so placed because of the action or want of action of the Dawes Commission or of the courts?

6. Will it finally by the action of the Dawes Commission, divest of their property, any Indians entitled thereto?

7. In your judgment, should the refusal of the Dawes Commission to entertain applications of persons for enrollment, who have been recognized as members of the tribe in the Indian Territory and duly and lawfully enrolled as such?"

In order to properly answer your questions, a brief reference is necessary to the action of the Department in executing the provisions of section 21 of the act of Congress, approved June 28, 1898 (30 Stats., 495), prescribing the manner in which the Commission to the Five Civilized Tribes shall make rolls of citizenship of said tribes.

On March 17, 1899, pursuant to a request of the Department dated December 8, 1898, the Assistant Attorney General for this department rendered an opinion referring to the provisions of the several acts of Congress creating said Commission and continuing it in the discharge of its duties, and in said opinion he states that said act of June 28, 1898,

"prescribes the manner in which the Commission is to make rolls of citizenship of the several tribes, and that all names found to have been placed upon the tribal roll by fraud or without authority of law, shall be eliminated, and then declares:

"The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

* * * * *

"The Commission was authorized and directed to enroll the persons indicated, and to investigate the right of all other persons whose names are found upon any tribal roll, and to omit all such as may have been placed there by fraud or without authority of law. They were not authorized to add any name not found upon some roll of the tribe except those of descendants of persons rightfully upon some roll, and persons intermarried with members of the tribes and therefore lawfully entitled to enrollment.

"The rolls so made by the Commission are to be final 'when approved by the Secretary of the Interior.' This approval being required to give the quality of finality to the rolls, it follows necessarily that the Secretary of the Interior is clothed with some legal discretion and authority in granting or withholding his approval, and that he has a power of supervision or review over the acting of the Commission in preparing the rolls. This power of supervision and review extends to everything done by the Commission in the way of placing names upon or withholding names from the rolls which depends for its final sanction and effect upon the approval of the rolls by the Secretary of the Interior, but it does not include or authorize a re-examination of the decision of the Commission from which an appeal to the court was provided for and which therefore became final in the absence of such a decision of the court upon such an appeal. It does, however, enable the Secretary to see that any individual entitled to enrollment under any such final decision is placed upon the roll, and that any name placed thereon in disregard of any final decision is stricken therefrom."

This opinion was duly approved by the Department. On August 8, 1898, the Department approved regulations governing said Commission in its enrollment of members of said tribes, in which it is stated:

"The rolls so made up by your Commission must, to become final, receive the approval of the Secretary of the Interior. It will, therefore, be necessary for you to make a record in all cases sufficient to enable this (Indian) office and the Department, to take in-

telligent action in the premises, and especially in those cases where your decision either for or against the right of any person to have his name appear upon the rolls is complained of.

"For the purpose of this record you will require each applicant for enrollment to present himself in person before the Commission, at one of its appointments within the tribe in which said applicant claims right to enrollment, for examination, under oath, his statements to be taken down by the Commission, upon which the Commission will determine his rights to enrollment, and such record and action of the Commission will be preserved and transmitted with the rolls to be considered by this office and the Department when the rolls made by the Commission are submitted for the approval of the Secretary of the Interior."

On December 26, 1899, the Department rendered a decision in which a reference was made to said opinion of the Assistant Attorney General, and it was stated:

"A fair interpretation of the opinion of March 17, 1899, by the Assistant Attorney General is that the question of citizenship cannot be re-opened by new applications; and that only citizens especially provided for in the act of June 28, 1898, can be enrolled. All applicants for enrollment must, under the regulations approved August 8, 1898, present themselves in person, and whenever it appears to the Commission that it is without jurisdiction, it should deny the application and should file and retain such papers as have been presented in support of the application, and should make a complete record of the matter, explicitly stating therein the grounds upon which the applicant is denied, and should advise the parties in interest, in writing, of the decision, in order that they may understand fully the cause of rejection, and in order that the matter may be considered by the Secretary of the Interior when the rolls are presented for approval."

In view of the legislation heretofore enacted, and the action of the Department thereunder, it is considered essential

and necessary for the protection of all parties in interest that the action of said Commission shall be subjected to the supervisory authority of the Secretary of the Interior, and the Department distinctly object to that portion of said amendment which declares that the action of the Commission in refusing applications of persons to be enrolled "shall be final."

In answer to your specific question you are advised that the first question must be answered in the affirmative.

The answer to the second question must also be in the affirmative. Said section 21 declares that said Commission

"shall investigate the right of all other persons whose names are found on any other rolls, and omit only such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to citizenship under Cherokee law."

The amendment declares that

"Said Commission shall not receive the application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such."

apparently omitting from the consideration of the Commission any application by "descendants born since such rolls were made, with such intermarried white persons as may be entitled to citizenship under Cherokee laws."

The third question must be answered in the affirmative, as far as it relates to the refusal by said Commission of any applications made to it by persons claiming the right to be enrolled as citizens of said tribes.

Your fourth question must be answered in the negative, for the reason that the amendment expressly excluded the Mississippi Choctaws from its provisions.

In answer to your fifth question, you are advised that it would depend upon the action of said Commission what effect it would have upon the rights of individual Cherokees,

the enrollment of which has not yet commenced, under the provisions of said section 21 of the "Curtis Act."

The answer to your sixth question must be that it will depend upon the action of the Commission whether any Indians would be divested of their property for the reason that the refusal of the applications cannot be reviewed by the Secretary.

Your seventh question appears to be incomplete. If you intend to inquire whether "The refusal of the Dawes Commission to entertain applications of persons for enrollment who have been recognized as members of the tribe in the Indian Territory, and duly and lawfully enrolled as such, should be subject to the review of the Secretary, the answer would be in the affirmative.

Your attention is also invited to the recommendation of the Department relative to said proposed legislation, in which the conclusion of the Commissioner of Indian Affairs was concurred in, namely, that Congress should be requested to strike out said provisions from said bill.

This altercation calls attention forcibly to the method adopted by the Dawes Commission of keeping the records of all cases which have been disposed of by the Commission. A card index has been kept of every applicant examined. The names of those who have been found duly entitled to enrollment have been placed upon red cards; those applicants whose rights have not been clearly established to the satisfaction of the Commission have been listed on white cards, while the names of all applicants rejected have been placed upon blue cards. Those cards which have been appealed to the Federal courts in the Territory, and where orders have been issued to the Commission to place the petitioners upon the rolls still remain on the white or doubtful cards.

It is estimated that the number of court orders thus issued in the Territory, aggregate about 1,800. The number of cases pending before the courts now, number about 5,000. Should the paragraph inserted in the Indian Appropriation Bill, giving the Dawes Commission final jurisdiction, become a law, these court orders could be nullified and the doubtful applicants rejected and thus deprived of any source of redress.

The importance of the question to the people of the Territory becomes at once apparent.

(Book 8, p. 192.)

MUSKOGEE, INDIAN TERRITORY,
April 21, 1900.

The Commissioner of Indian Affairs.

SIR: The Commission is just in receipt of your letter of April 17th, 1900, inclosing copy of Bill S. 2875, "To amend an act of Congress, dated June 28, 1898, so as to provide for additional enrollment of Cherokee, Choctaw, Chickasaw and Creek Indians now residing in Indian Territory, and for other purposes," with the request that the Commission report its views thereon. Under the act of Congress, June 10, 1896, the Commission to the Five Civilized Tribes was authorized to receive, consider and act upon applications for citizenship in the several tribes in Indian Territory. All applications were to be filed within ninety days from the date of said act and the Commission was required to pass upon each application within ninety days after it was filed. The tribal authorities were also authorized, within said time, to receive applications for admission to citizenship and they were required to pass upon same within thirty days after the applications were filed. During the ninety days during which applications might be so filed, the Commission received and filed about 7,500 applications for citizenship in the several tribes, embracing probably 75,000 people, all of which were passed upon and applicants either admitted or rejected. No applications were made to the tribal authorities under such act, except, possibly, a few to the Creek Citizenship Commission, for the reason that no other tribe had in existence a Commission or court authorized to receive and consider such applications. All applicants had the right of appeal to the United States Court in Indian Territory within sixty days after date of decision by the Commission, and, failing to appeal within said time, the judgments became final. The tribes had a like right of appeal. Many appeals were taken to the United States court by applicants and a few by the tribes, all of which have been disposed of by the court and the applicants either admitted to citizenship, or denied same, in the tribes into which they sought admission. It was, evidently, the purpose of this legislation to afford all persons who believed they were entitled to citizenship, either by reason of blood or otherwise, an opportunity

to be heard and to make a final ending of the question of citizenship in the several tribes in order that final rolls of citizens might be completed, preparatory to allotment of lands and distribution of moneys belonging to the tribes, and it is so held by the Interior Department.

It is a well-known fact that the persons seeking the legislation referred to in the bill under consideration are, practically, white people with but a small quantum of Indian blood, if any, and that the valuable landed estates, with the large moneyed interests, are strong stimulants for such persons to seek the right to share this property. This bill simply seeks to open up the question of citizenship in the several tribes, and if this should be done, the number making application will be much greater than heretofore and the question of making final rolls of the several tribes, as contemplated by former legislation, would be utterly defeated and great injustice done to the Indian citizens composing these tribes, and in few cases, if any, would the persons admitted to citizenship be rightfully entitled to share in the said property. The work of settling the question of citizenship in the several tribes would be almost interminable and the allotment of lands and the distribution of moneys for which the Government has already, and is still, expending so much money, would be delayed indefinitely.

It is the opinion of this Commission that nothing contained in this bill should be enacted into law.

Very respectfully,

(Signed)

TAMS BIXBY,
Acting Chairman.

Book 35, p. 55.

MUSKOGEE, INDIAN TERRITORY,
January 17, 1901.

The Honorable the Secretary of the Interior.

SIR: The Commission has the honor to acknowledge the receipt of a letter to the Department from S. S. Bluejacket and Thomas Dougherty, under date of December 31st, 1900, and endorsed by Acting Secretary Ryan: "For consideration, report and recommendation."

Messrs. Bluejacket and Dougherty purport to represent the Shawnees. They state that a good many members of that

branch of the Cherokees have been put upon the "doubtful list;" that the Commission has "announced that those on the doubtful list, and those who desire to prove their citizenship will have to appear before it at Muskogee, Indian Territory, sometime in the month of January." They further state that "A great many live over one hundred miles away, and are not financially able to make the journey and wait until their turn comes for a hearing before the Commission. A still greater number are totally unable to hire an attorney to represent them before the Commission." * * *

In this connection they desire that the Commission "modify its announcement with regard to the manner and time and place of receiving proof." * * * Then they ask that it be allowed for "these people who show satisfactorily that they are unable to go to Muskogee to show by affidavits their right to citizenship," * * * which evidence they, the correspondents, ask to be allowed to present to the Commission, as representatives of such applicants.

Reply is made to these points in the order in which they have been given, and they are replied to somewhat fully, as representations of this character should, doubtless, be so dealt with at this time.

1. The Commission has no information, official or otherwise, that these persons represent the Cherokee Shawnees, or that those Indians have ever selected, or thought of selecting anyone to represent them. No occasion for their doing so is known to the Commission.

2. The Commission has never made any such announcement as that attributed to it, or any official announcement of any character, relating to the taking up of the "doubtful cases," beyond saying to individual applicants at the time of their applications, that the case would be considered at some convenient future time, and that the decision of the Commission would be made known to them.

Such cases, for the most part, are already made up and only await fuller consideration by the Commission than could readily be given at the time, or they await only some official paper to be supplied to complete the case.

3. No separate roll is kept of the doubtful Shawnees' cases, and the status of such Indians does not call for such treatment. They are simply a part of all the Cherokee doubtful cases. The writer however, who participated in all such enrollments, is sure, from his experience, that there are very

few of these cases. The amplest opportunity has been afforded for all Shawnee Cherokees to be enrolled. The section where they live was covered by really superfluous appointments, as it turned out; no opposition to enrollment was manifested by this limited class of Cherokees, and there is every evidence that the work with them has been very complete.

4. There being no such announcement as that indicated by the writers, no modification can be made. When we begin the consideration of these cases we can definitely tell the extent and character of their needs. When that time comes (and it cannot now be definitely indicated) the Commission will, by its proceedings, indicate a course of procedure. If that course should not appear just and reasonable, it would then, of course, be subject to complaint and amendment.

5. As to persons showing their "right to citizenship," and by "affidavits," it should be observed, first, that the Commission is not engaged in a proceeding to determine a "right to citizenship," but is making a roll of those who have already acquired that right and are shown to now possess it. Second, proof by affidavit is not the character of proof contemplated in these proceedings by either the law or regulations. The requirement that we shall make these rolls "descriptive of the persons thereon," and are given authority to require "all citizens * * * to appear" (act of June 28, 1898, sec. 21), in order to carry out the very careful injunctions of the law, and the well-known insistence of the Department requiring all citizens to appear "in person," where such can possibly be done, all preclude the loose form of evidence desired by the writers. Even if such evidence was permissible, it would be most unadvisable, for it would open the door to endless labor, and doubtless, to great frauds. It is to avoid this, as well as to comply with the law, that the Government has gone to the great expense of the policy of local appointments of its enrolling party, giving all citizens ample chance to apply for enrollment, and substituting personal testimony and examination for the proposed method of proof.

It is respectfully recommended, in conclusion, that the Department, in replying to the correspondents, refrain from addressing them or in any way recognizing them in the capacity in which they sign themselves and which they

claim. Any recognition of this status could be used to unduly impress ignorant claimants, most, if not all, of whom would have no occasion in fact to employ these or any other lawyers or persons in these proceedings.

2d. That Messrs. Bluejacket and Dougherty be informed that the Commission has not yet fully determined its course, nor issued any formal announcement of its purposes in regard to "doubtful" cases, and that nothing definite can be stated in regard to that branch of the work of enrollment until it is reached in its regular order.

3d. It may be stated, however, that in the main, such proceedings as they seem to contemplate are by no means probable, as the present work of the Commission is not to determine the "right to citizenship" of any person, but only the right to *enrollment* of those who are *already* citizens; and such cases are generally already made up and ready for consideration and decision when they can be reached by the Commission. The Commission is mindful of the rights of applicants for enrollment, and in any case where special evidence or argument appears necessary, the applicant will be given timely notice by the Commission so as to enable him to take whatever steps he may deem necessary for the further protection of his interests.

4th. If there should appear any general need for people to appear before the Commission, this body should be informed of the fact, with a view to having local appointments made for the convenience of the people, as has been done throughout the course of this enrollment, and as is still contemplated by the Commission. This is all the more desirable as the law contemplates proof of existing citizenship by the rolls and the personal appearance of the citizens, and not by affidavits and similar evidence as might be the case in original proceedings to secure recognition of a "right to citizenship."

5th. In regard to their desire to be allowed to represent claimants before the Commission, the right is now open to all reputable attorneys, and has never been denied to any.

In the remarks upon this letter, which is hereby returned I have tried to indicate, in addition to replying to the particular points involved, the necessity, now growing more urgent, to guard against the efforts of interested parties to institute frivolous proceedings for purposes of delay and to

in points of advantage for the purpose of continuing to
 upon an ignorant and deluded class of people.

Very respectfully,

Your obedient servant,

C. R. BRECKINRIDGE,
Commissioner.

Through the Commissioner of Indian Affairs.

Enc. 501.

Book 41, p. 106.

MUSKOGEE, INDIAN TERRITORY, March 2, 1901.

The Honorable the Secretary of the Interior.

SIR: I have the honor to submit herein below a report
 the work done under the direction of the Commission to the
 the Civilized Tribes during the month of February, 1901.

* * * * *

CREEK SELECTION OFFICE.

During the month of February, 1901, there were two
 hundred and fifteen applications for allotment presented to
 the Muskogee Land Office. Of this number seventy-two
 were in the form of applications to have certain lands re-
 voked pending the ratification of the Creek Agreement and
 on which these applications depended to become effective.
 There were ten cases in which adjustments were made
 owing to conflicting improvements, which adjustments were
 made without contest.

While a slight increase in the number of applications is
 shown over the past few months, the Commission has de-
 cided to remove the Muskogee Land Office to Okmulgee,
 during the month of March, and to make an effort to reach
 all of the remaining citizens in the immediate western and
 northwestern territory.

In this connection it is proposed to place several parties
 in the field for the purpose of locating these people and
 making every effort possible to afford them an opportunity of
 rolling and filing their selections.

* * * * *

Respectfully submitted,

(Signed)

TAMS BIXBY,
Acting Chairman.

Through the Commissioner of Indian Affairs.

(Book 42, p. 57.)

OKMULGEE, INDIAN TERRITORY, March 6, 1901.

Mr. Timmie Fife, Sapulpa, Indian Territory.

DEAR SIR: Enclosed herewith you will find a list of the citizens of Hitchetee town, who have not yet enrolled or selected allotments.

The Commission to the Five Civilized Tribes has established the enrollment division and land office for the Creek Nation at Okmulgee, where it will be located until and including the 27th day of March. The Commission desires that all Creek citizens who have not been enrolled and received allotments prior to this time, shall do so as soon as possible. This work must be finished immediately, and the Commission requests that you assist it by going among your people and urging them to come to Okmulgee before the 27th of March for the purpose of enrolling and taking their allotments.

If you will call upon one of the appraisement camps under the direction of the Commission, and present this letter, arrangements will be made by the appraiser in charge of the camp, to pay you for your services at a reasonable rate.

Please acknowledge receipt of this list and letter at your earliest convenience, and notify the Commission whether or not you will undertake to see each citizen whose name is on same, stating also, the date when you will begin work.

There will be sent you under separate enclosure, hand bills which please post in conspicuous places.

Yours very truly,

(Signed)

TAMS BIXBY,

Acting Chairman.

Enc.

Book 42, p. 55.

OKMULGEE, INDIAN TERRITORY, March 6, 1901.

Jesse Allen, Esq., Bristow, Indian Territory.

DEAR SIR: The Commission to the Five Civilized Tribes has established the enrollment division and land office for the Creek Nation at Okmulgee, where it will continue to be located until and including the 27th day of March. The Commission desires that all Creek citizens who have not been

enrolled and received allotments prior to this time shall do so as soon as possible. This work must be finished immediately, and the Commission requests that you assist it by going among your people and urging them to come to Okmulgee before the 27th of March.

If you will call upon one of the appraisement camps under the direction of the Commission, and present this letter, arrangements will be made by the appraiser in charge of the camp to pay you for your services at a reasonable rate.

Please acknowledge receipt of this letter at your earliest convenience, notifying the Commission whether or not you will be able to assist, as indicated above.

There will be sent you under separate enclosure hand bills, which please post in conspicuous places.

Yours very truly,
(Signed)

TAMS BIXBY,
Acting Chairman.

(Book 42, p. 60.)

OKMULGEE, INDIAN TERRITORY, March 6, 1901.

THOMAS Wesley, Esq., McDermott, Indian Territory.

DEAR SIR: The Commission to the Five Civilized Tribes has established the enrollment division and land office for the Creek Nation at Okmulgee, where it will continue to be located until and including the 27th day of March. The Commission desires that all Creek citizens who have not been enrolled and received allotments prior to this time shall do so as soon as possible. This work must be finished immediately, and the Commission requests that you assist it by going among your people and urging them to come to Okmulgee before the 27th of March.

If you will call at one of the appraisement camps under the direction of the Commission, and present this letter, arrangements will be made by the appraiser in charge of the camp to pay you for your services at a reasonable rate.

Please acknowledge receipt of this letter at your earliest convenience, notifying the Commission at this place whether or not you will be able to assist, as indicated above.

There will be sent you under separate cover hand bills, which please post in conspicuous places.

Yours very truly,
(Signed)

TAMS BIXBY,
Acting Chairman.

(Book 42, p. 58.)

OKMULGEE, INDIAN TERRITORY, March 6, 1901.

Mr. John Jacobs, Town King, Holdenville, Indian Territory.

DEAR SIR: Enclosed herewith you will find a list of the citizens of Tuckabache town who have not yet enrolled or selected allotments. The Creek enrollment division and land office will be located at Okmulgee from March 6th to March 27th, inclusive, and the Commission desires that as many people be enrolled and receive allotments during that time as possible. In order to accomplish this the Commission respectfully requests that you go out among your people and urge them to come to Okmulgee before the 27th of March. You will be paid for your services at the rate of \$2 for each day you work. It is presumed that you will be able to accomplish this work in at least a period of ten days. If you should not be able to finish this work in ten days please notify the Commission at this place for further instructions.

We are sending you today, under separate cover, twenty-five hand bills, which please post in conspicuous places.

Please acknowledge the receipt of this list at your earliest convenience, and notify the Commission whether or not you will undertake to see each citizen whose name is on the enclosed list, stating also the date when you will begin work.

Yours very truly,

(Signed)

TAMS BIXBY,
Acting Chairman.

2 enclosures.

(Book 43, 213.)

OKMULGEE, INDIAN TERRITORY, March 11, 1901.

Mr. John D. Brown, Shawnee, Oklahoma.

DEAR SIR: The Commission is in receipt of your letter of March 6th, 1901, in which you inquire what action the Commission will take in the matter of application for allotments of land in the Creek Nation made by certain Indians heretofore claiming to be Shawnees, and who have received allotments of land in Oklahoma.

In reply thereto you are advised that such applicants will

be obliged to appear in person before the Commission for examination under oath as to their rights in the Creek Nation, and until such time as their cases have been properly presented and considered the Commission will be unable to deny or indicate the status of their claims.

Yours very truly,

TAMS BIXBY,
Acting Chairman.

(Book 43, page 231.)

OKMULGEE, INDIAN TERRITORY, March 14, 1901.

Hon. Pleasant Porter, Chief of Muskogee Nation, Muskogee, Indian Territory.

MY DEAR GOVERNOR: I am advised that you have agreed to look after the enrollment of the following-named citizens of Big Spring Town:

Eliza Reynolds.	Nora Smiley.
Lewis Reynolds.	Lottie.
David Reynolds.	Earnest.
Jerry Reynolds.	Allen.
Lee Henry.	George Everett Foreman.
Edward Porter.	Maggie Bell Foreman.
Ben E. Porter.	Ruth Foreman.

Please advise me upon receipt of this communication whether or not I am correctly informed regarding your intentions relative to this matter. As you are, of course, aware, we are endeavoring to secure the enrollment of every citizen who has not, prior to this time, appeared before the Commission.

We are preparing lists of the unenrolled of each town and sending out special agents to bring in the delinquents. We trust that you will do everything in your power to induce the citizens named above to appear before the Commission immediately, for enrollment.

Sincerely yours,

TAMS BIXBY,
Acting Chairman.

PARIS, TEXAS, Apr. 5th, 1901.

To the Hon. Dawes Commission, Muskogee, I. T.

SIRS: I am through with U. S. court at this place and am ready now to call convention of the Euchees by the 16th of Apr.

I will be very glad to know if you can have a man come out there and enroll what had not been enrolled. The convention will be held four miles south of Killyville.

Respectfully,
(Signed)

N. G. GREGORY.

(Copy of Letter on Page 421, Book 46.)

MUSKOGEE, INDIAN TERRITORY,

April 11, 1901.

Mr. Noah G. Gregory, Red Fork, Indian Territory.

DEAR SIR: The Commission is in receipt of your letter of April 5, 1901, in which you state that you are now ready to call a convention of the Euchees by the sixteenth of April, and desire to know if the Commission can have a man at that place to enroll those members of that town who have not as yet appeared before the Commission.

While the Commission would be greatly pleased to comply with your request in the matter, business in the office of the Creek Enrollment Division is such, at the present time, that it would be impossible to make any outside appointments prior to May first. You are advised that the Commission will be at Okmulgee, Indian Territory, on May 6th, for the purpose of enrolling all citizens of the Creek Nation who have not heretofore been enrolled by this Commission, and would respectfully request that you notify the Euchees of this appointment, as far as it is possible for you to do so.

Yours truly,

TAMS BIXBY,
Acting Chairman.

(Copy of Letter on Page 459, Book 46.)

MUSKOGEE, INDIAN TERRITORY,
April 12, 1901.

Mr. W. A. Erwin, Lambdin, Oklahoma.

DEAR SIR: The Commission is in receipt of your letter of April 9, 1901, inclosing a newspaper clipping relative to the new roll of Creek citizens. You inquire whether it will be necessary for your wife, Mary Erwin, to again appear before this Commission for enrollment, or whether or not you can appear for her, and state that she selected a preliminary allotment on August 23, 1899.

In reply you are advised that it will not be necessary for your wife, or yourself as her agent, to again appear before the Commission, and that the class of citizens who may be adversely affected by failing to appear for enrollment before the ratification of the Creek Agreement are those who have not heretofore been enrolled by this Commission.

Yours truly,

TAMS BIXBY,
Acting Chairman.

Executive Office, Muskogee Nation.

P. Porter, Principal Chief.

MUSKOGEE, I. T., April 30, 1901.

DEAR SIR: In accordance with the terms of the agreement ratified by Congress March 1st, and to be presented to the Creek Council at the extra session of May 7th, it is provided, "That no person shall be added to the rolls after the ratification of this agreement."

While this was an error of date, and should have been placed at some time thereafter, or at least sufficient time given to enroll all of the Creek citizens, the time which the Creeks were given to ratify the Agreement was ninety days, which will expire on the 29th of May. For this reason the council was postponed to as late a date as possible, giving sufficient time, however, to fairly consider all of the provisions of the agreement prior to the ratification by the Creek Council. The Dawes Commission thought that by putting

an extra force in the field the work of enrolling all Creek citizens could be accomplished by the 7th of May, but in event that some may have not enrolled, that during the meeting of the Council the members of the respective houses of Kings and Warriors representing the several towns of the Creek Nation would all be present, and that the work could be finished by their bringing in all persons that may have been omitted, or who may not have been enrolled, so that at the time of the ratification all persons entitled to allotment by virtue of being Creek citizens would be enrolled.

As the council is now approaching, I deem it proper to write a letter, to respectfully request that each member of the House of Kings and those of the House of Warriors of the respective towns of the Creek Nation cooperate in seeing to it that all persons, Creek citizens, who have not been enrolled, belonging to their respective towns be, through the head of each family, caused to appear at Okmulgee for the purpose of enrolling themselves and families. Where persons are unable by reason of infirmities or sickness from reaching Okmulgee, that properly executed powers of attorney be given to the members of the council by such persons, authorizing them to place their names upon the rolls of Creek citizens, in order that each and every Creek citizen may be enrolled, as this is the only means that will entitle them to their distributive shares of the lands and other property of the Creek Nation. While each and every Creek citizen is and are joint heirs in the estate, should any, by lack of appreciation of the necessity of enrollment, it can not be deemed a wrong to such persons to provide means through which they shall receive their distributive share, and it is the desire of the authorities of the Creek Nation that no Creek citizen shall be, even by reason of his own act, deprived of his proportionate share in the common estate of the Creek people.

Respectfully,

P. PORTER,
Principal Chief

(Copy.)

In the United States Court in the Indian Territory, Northern
District of Muskogee.

Before the Honorable John R. Thomas, Judge of the United
States Courts in Indian Territory.

This day came the Commission to the Five Civilized Tribes, by Tams Bixby, a member of said Commission and its Acting Chairman, and shows to the court that there are a large number of persons who should be enrolled as citizens of the Creek Nation who have not yet presented themselves for enrollment as required by law, and petitions the court to issue an order requiring such persons to appear before said Commission for enrollment at Okmulgee, Indian Territory, between May 7th and May 15th, 1901.

It is therefore ordered by the Court that all recognized citizens of the Creek Nation who have not heretofore presented themselves in person before said Commission for enrollment, be and appear before said Commission for enrollment at Okmulgee, Indian Territory, between May 7th and May 15th, 1901, and that on the failure of any person who should be enrolled as a citizen of said Creek Nation to appear before said Commission for enrollment within the time and at the place stated in this order, after having been duly served with a copy of this order such person or persons be reported to this court to be dealt with according to law.

Done in open court at Muskogee, Indian Territory, this first day of May, 1901.

JOHN R. THOMAS,
Judge.

UNITED STATES OF AMERICA,
Indian Territory,
Northern District, ss:

I, Chas. A. Davidson, clerk of the United States Court for the Northern District, Indian Territory, do hereby certify the above and foregoing to be a true and correct copy of an order of court made on the 1st day of May, 1901.

Witness my hand and the seal of said court at Muskogee, this 1st day of May, A. D. 1901.

[SEAL.]

CHAS. A. DAVIDSON,
Clerk,

By P. M. FORD,
Deputy.

Book 52, p. 251.

Copy.

OKMULGEE, INDIAN TERRITORY, May 20, 1901.

Hon. Leo E. Bennett, United States Marshal, Okmulgee, Indian Territory.

DEAR SIR: I have the honor to advise you that the Commission is in possession of reliable information that Willie and Tom Sullivan, belonging to Quassarte No. 1 Town, and residing seven miles northwest of Eufaula, have refused to appear before the Commission for enrollment.

You are respectfully requested to command these persons to appear before the Commission at Okmulgee on or before May 24th, 1901, in compliance with the order of United States Court.

Very respectfully,
(Signed)

TAMS BIXBY,
Acting Chairman.

Book 52, pp. 356-357.

VINITA, INDIAN TERRITORY, May 21st, 1901.

M. J. Horn, Esq., Badxite, Arkansas.

SIR:

* * * * *

The rules and regulations of the Secretary of the Interior, as well as of the Commission, require that each applicant shall appear in person for the purpose of making an application for enrollment. If the parties to whom you refer desire to apply for enrollment, they can do so by appearing before the Commission at one of its appointments in the Cherokee Nation, a list of which is herewith enclosed, or at the general office of the Commission at Muskogee after the first day of September.

A citizen of the Cherokee Nation cannot transfer his right to allotment to another party.

Very respectfully,

Enc. C. C. N.

Commissioner.

Book 52, pp. 375-76.

VINITA, INDIAN TERRITORY, May 22d, 1901.

Mr. R. F. Allen, Grapevine, Texas.

SIR:

* * * * *

The rules and regulations of the Secretary of the Interior, as well as of the Commission, require that each applicant for enrollment shall appear in person before the Commission.

If, in view of the foregoing citations, you still desire to apply for enrollment, you can do so by appearing before the Commission at one of its appointments in the Cherokee Nation, a list of which is herewith enclosed, or at the general offices at Muskogee after the first day of September, 1901.

Very respectfully,

Commissioner.

Inc. C. C. N.

Book 52, pp. 364-65.

VINITA, INDIAN TERRITORY, May 22d, 1901.

Mrs. J. C. Oats, Clanton, Alabama.

MADAM:

* * * * *

The rules and regulations of the Secretary of the Interior, as well as of the Commission, require that all applicants for enrollment shall appear in person before the Commission.

If, in view of the above citations, you still desire to apply for enrollment, you can do so by appearing before the Commission at one of its appointments in the Cherokee Nation, a list of which is herewith enclosed, or at the general office in Muskogee after the first day of September, 1901.

Very respectfully,

Commissioner.

Enc. C. C. N.

Book 52, p. 380-81.

VINITA, INDIAN TERRITORY, May 22d, 1901.

Mrs. Harriett Full, #418 Indiana St., Lawrence, Kansas.

MADAM:

* * * * *

The rules and regulations of the Secretary of the Interior, as well as of this Commission, require that each applicant for enrollment shall appear in person before the Commission.

If, in view of the foregoing citations, you still desire to apply for enrollment as a citizen of the Cherokee Nation, you can do so by appearing in person before the Commission at one of its appointments in the Cherokee Nation, a list of which is herewith inclosed, or at the general offices at Muskogee, after the first day of September, 1901.

Very respectfully,

Commissioner.

Inc. C. C. N.

(Copy of Letter on p. 355 in Book 56.)

MUSKOGEE, INDIAN TERRITORY, June 21st, 1901.

Mrs. Ruth Davis, Waynesboro, Mississippi.

DEAR MADAM: The Commission is in receipt of your favor of the 5th inst., in which you ask information as to the proper method of procedure to take in establishing your right to take allotment in the Creek Nation. You state that you are a Creek Indian by blood.

In reply to your letter, you are advised that the Commission could not determine your rights to citizenship until you made a personal appearance before the Commission at its office in Muskogee, for the purpose of identification and examination under oath.

In this connection, however, you are advised that the act of Congress of May 31st, 1900, provides:

"Said Commission shall continue to exercise all authority heretofore conferred on it by law. But it shall not receive, consider, or make any record of any application of any person for enrollment as a

member of any tribe in Indian Territory, who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, and its refusal of such applications shall be final when approved by the Secretary of the Interior.

"Yours truly,

"C. R. BRECKENRIDGE.

"Commissioner in Charge."

Book 59, p. 334.

MUSKOGEE, INDIAN TERRITORY, July 13, 1901.

James Ellis, Osa, Barry Co., Mo.

DEAR MADAM: The Commission is in receipt of your favor which you inquire whether or not you have a landed interest in the Creek Nation. You also state that your grandfather was a full blood Creek Indian.

In reply to your letter, you are advised that the Commission cannot determine the rights of applicants to citizenship until the applicant appears in person before the Commission for the purpose of identification, and examination and oath.

In this connection, you are advised that the act of Congress approved May 31, 1901, contains the following provision:

"That said Commission shall continue to exercise all authority heretofore conferred on it by law. But it shall not receive, consider or make any record of any application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such."

Your letter from the U. S. Indian Agent is herewith received.

Yours truly,

Commissioner in Charge.

Book 59, p. 355.

MUSKOGEE, INDIAN TERRITORY, July 13, 1901.

Mrs. Co-se-na Johnson, Bristow, Ind. Terr.

DEAR MADAM: The Commission is in receipt of your favor of the 1st ult., inquiring if you can file for your daughter, Lone Tiger, now deceased.

In reply to your letter, you are advised that upon application of a near relative or duly appointed administrator, land will be reserved for the heirs of a deceased person whose death may be established in accordance with the Creek Agreement ratified by the Creek Council May 25, 1901, but said land will not be allotted until the Commission has determined the proceedings relative thereto.

Yours truly,

(Signed)

T. B. NEEDLES,
Commissioner in Charge.

Book 1, p. 429.

MUSKOGEE, INDIAN TERRITORY, November 12, 1901.

The Honorable the Secretary of the Interior.

SIR: I have the honor to submit the following report of work done under the direction of the Commission to the Five Civilized Tribes during the month of October:

* * * * *

CREEK ENROLLMENT DIVISION.

During the month of October there were heard the applications of twenty-three persons for enrollment as citizens of the Creek Nation. These applications are still pending. Citizenship certificates were issued to 443 persons desiring to make applications for allotments of land. During the month of October the field party which had been sent into the Creek Nation for securing additional data as indicated in the Commission's report for the month of September, has made very satisfactory progress.

CREEK ALLOTMENT DIVISION.

Applications were made during the month of October for preliminary allotments and of this number 373 received ion certificates. Fifty-five certificates were issued to the of deceased persons.

* * * * *

Respectfully submitted,

TAMS BIXBY,
Acting Chairman.

Book 787, pp. 256 and 271.

MUSKOGEE, INDIAN TERRITORY, November 24, 1906.
The Select Committee of the Indian Committee of the United States Senate.

* * * * *

GENTLEMEN:

The action of the Commission in 1898 and 1899, in requiring applicants for enrollment to appear personally before it and submit their claims was taken pursuant to a resolution of the Commission which procedure was subsequently approved by the Department in a letter from the Commissioner of Indian Affairs to the Commission to the Civilized Tribes dated July 25, 1899, and approved by the Acting Secretary of the Interior on August 8, 1899. In a letter it was provided specifically that the rolls of citizens to be made by the Commission under the Act of June 28, 1898, must be submitted to the Secretary of the Interior for approval; that it therefore became necessary for the Commission to make a record in all cases sufficient to enable the Department to take intelligent action in the premises, especially in those cases where the Decision of the Commission was for or against the right of any person to have his name placed upon the roll is complained of, and that for the purpose of this record the Commission should require each applicant for enrollment to present himself in person before the Commission at one of its appointments within the tribe in which such applicant claims right to enrollment for examination under oath, his statement to be taken down by the

Commission upon which the Commission should determine the right to enrollment, and such record and action of the Commission should be preserved and transmitted with the roll to the Department for its consideration. A copy of said letter is transmitted herewith, marked Exhibit F.

* * * * *

These persons of mixed Indian and negro blood, whose maternal ancestors were negroes, have, with few exceptions, been classed by the tribes as freedmen, and they themselves have made no claim to any other rights than the rights of freedmen, until the possibilities of the opinion of the Department in the Joe and Dillard Perry case were presented to them.

Citizenship attorneys in the Choctaw and Chickasaw Nations have solicited business of this character, and are procuring these claims upon a contingent basis. Before your committee three of these individuals who are so active in pushing the claims of these persons, admitted that they represented over 1200 applicants of this class.

It is well known that in nearly all of these cases the attorneys and agents have an agreement with the applicants, whereby in the event they are enrolled as citizens by blood, the attorney is to get a portion of the allotment, in many cases the whole surplus, which amounts to one-half of the land, or 160 acres of average allottable lands in the Choctaw and Chickasaw Nations. This surplus allotment, at a conservative estimate, is worth \$1,500,000, and it can easily be seen that the glittering prize which appears before the eyes of these individuals is of such magnitude as to cause them to exert every effort to attain their ends, even to engage in malicious attacks upon any one who stands in their way.

It is a fact that the claims of many of these persons are not brought forward by the applicants themselves, but that these petitions have been filed by a small class of individuals acting as attorneys and agents, who are pushing these claims, not in my judgment by reason of any fees which the applicants have paid them for their efforts in their behalf, but by reason of the contingent fees which they see before them in the event that these claims can in some manner be established.

Nearly all this class of persons, who are enrolled as freedmen, voluntarily took their allotments as such, and never

attempted to assert any rights as citizens by blood until within the last year.

I have submitted this matter to your committee fully, for the reason that in my judgment it is one of great importance to the Choctaw and Chickasaw Indians, and that if this large class of negroes, who are possessed of some Indian blood, but who have never been recognized by the Indian Tribes as citizens by blood are now forced upon them as equal citizens, a great injustice to the Choctaw and Chickasaw tribes will result.

Respectfully submitted,

(Signed)

TAMS BIXBY,

Commissioner to the Five Civilized Tribes.

(10 inclosures.)

Book 41, p. 296.

(Telegram.)

Paid Govt.

MUSKOGEE, I. T., March 2, 1901.

Secretary of Interior, Washington, D. C.:

Paragraph twenty-eight Creek Agreement as modified provides that no person whomsoever shall be added to the rolls after the ratification of the treaty. Act of Congress provides that agreement must be ratified within ninety days from approval by President. Exceedingly doubtful if enrollment of Creeks can be completed within time specified. Paragraph twenty-eight also inconsistent with other provisions of agreement. Congress should be asked to amend agreement by joint resolution fixing date for closing rolls September first nineteen one.

BIXBY.

Book No. 55, p. 332.

MUSKOGEE, INDIAN TERRITORY, June 12, 1901.

The Honorable the Secretary of the Interior.

SIR:

* * * * *

CREEKS.

Applications for enrollment as Creek citizens were received at Muskogee up to and including May 4, 1901. On May 6th the Creek enrollment division opened an office for the hearing of applicants at Okmulgee, Indian Territory, at which place the Creek Council convened in special session on the following day. The members of the Council and other Creek officials interested themselves in procuring the appearance of citizens who had not been enrolled, and in many instances reported that members of the tribes were without means of conveyance and unable to reach Okmulgee. To meet such an emergency, the Commission transferred all surplus teams and wagons to Okmulgee, and upon receipt of reports above mentioned, used its own conveyances to bring in and return that class of persons to their homes.

The work of enrollment was continued up to and including May 24, 1901, an act of Council ratifying the Creek Agreement having been signed by the Principal Chief on May 25th. During the month there were enrolled 2540 citizens by blood and 106 Creek Freedmen, a total of 2646 persons. Of this latter number were 124 persons whose applications had been previously made and whose cases had been awaiting further investigation and decision of the Commission as to their citizenship.

The Commission believes that but with few exceptions all persons whose names are found on the last authenticated Creek rolls, and are bona fide citizens of the Nation, have been registered.

The Creek Agreement provides that—

"All citizens who were living on the first day of April, 1899, entitled to be enrolled under Section 21 of the Act of Congress approved June 28, 1898, entitled 'an act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said Act of Congress."

A large portion of the citizens were enrolled by the Commission prior to April 1st, 1899, and it will now be necessary to obtain information sufficient to determine whether or not they were living on said date.

On May 1st, the Commission applied to the United States Court for a general order requiring that Creek citizens who had not appeared before the Commission for enrollment to

present themselves at Okmulgee, Indian Territory, between May 7th and May 15th. This order was granted by Hon. John R. Thomas. A copy thereof was submitted with the Commission's report for the month of April. This action was taken under Section 21 of the Act of Congress of June 28, 1898. The work of the Commission was facilitated to some extent by the assistance thus received from the Court.

* * * * *

Respectfully submitted,

_____,
Acting Chairman.

Through the Commissioner of Indian Affairs.

Book No. 10, p. 382.

MUSKOGEE, INDIAN TERRITORY, December 8, 1902.

The Honorable the Secretary of the Interior.

SIR: The Commission respectfully invites the attention of the Department to section nine of the Act of Congress approved March 1, 1901 (31 Stats., 861), known as the Creek Agreement, which is as follows:

"When allotment of one hundred and sixty acres has been made to each citizen, the residue of lands, not herein reserved or otherwise disposed of, and all the funds arising under this agreement shall be used for the purpose of equalizing allotments, and if the same be insufficient therefor, the deficiency shall be supplied out of any other funds of the tribe, so that the allotments of all citizens may be made equal in value, as nearly as may be, in manner herein provided."

Allotments have been made to practically all Creek citizens whose names appear upon the schedules, or partial rolls, heretofore approved by the Department. It has been expected that the last schedules of Creek citizens would have been submitted to the Department, and allotments made to the persons whose names will appear thereon, shortly after January 1, 1903. The Commission intended to then proceed with the allotment of lands for equalization purposes under the provisions of said section nine, above quoted, believing that provision had been made for closing the Creek rolls by the first paragraph of section twenty-eight of said act, which is as follows:

8r

"No persons, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement."

Its belief that provision had been made for closing the Creek rolls was based on the Commission's construction of said paragraph, which, briefly stated, is as follows:

That the term "rolls of citizenship of said tribe" has reference to the rolls of citizens being made by this Commission as provided by section 21 of the act of Congress approved June 28, 1898 (30 Stats., 495), the opening statement of which is: "That in making rolls of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed," etc.

That by the provision, "no person whomsoever shall be added to said rolls after the ratification of this agreement" it was intended to preclude from enrollment every person, regardless of his former status, who had not presented himself, in person or by proxy, before the Commission and made application for such enrollment prior to said ratification, with no other notice than the passage of said act by Congress and as effectually as recognized citizens of the tribe, who were not residents of the Territory at the time, were excluded from enrollment by the provisions of the act of Congress, approved June 28, 1898, *supra*. In this connection it may be stated that section twenty-nine of said act provides for the enrollment of full-blood Creeks and of non-resident citizens upon certain conditions was construed as a proviso to the paragraph under consideration.

That by the provision "No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement," the classes of persons mentioned in the two following paragraphs, viz., "All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eight, eighteen hundred and ninety-eight" and "All children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living," were notified that application for their enrollment must be made,

in person or by proxy, before the date of the ratification of the agreement.

On October 3, 1902, the Commission denied the application of Martha Smith and her three children for enrollment as citizens of the Creek Nation on the ground that said application had not been made prior to May 25, 1901. Under date of November 6, 1902 (I. T. D. 6425-1902), the Department held that the provisions in the agreement of 1901, now under consideration, did not prevent the enrollment of said parties and set aside the decision of the Commission. Martha Smith was admitted by the Commission under the act of June 10, 1896 (29 Stat., 321), and she is a descendant of a person whose name appears on the roll of Creek freedmen made by J. W. Dunn, but her name is not found on the authenticated Creek rolls of 1890 and 1895 and her children were born subsequent to her said admission.

The Commission on November 11, 1902, transmitted to the Department the record in the matter of the application of George Ard for enrollment as a citizen of the Creek Nation, together with the decision of the Commission, of the same date, denying said application for the reason that Ard "had not made application to, and had not been listed by, this Commission for enrollment as a citizen of the Creek Nation prior to May 25, 1901."

The Ard case is still pending before the Department and, while it is dissimilar to the Smith case in that his right to enrollment is based entirely on the fact that his name is found on the 1890 and 1895 rolls and the names of the applicants in the Smith case were not so found, the same law was applied to both cases by the Commission. It is with reference to its probable action in the Ard case that the Commission respectfully requests the Department to consider the provisions of section nine of the act of March 1, 1901, first above quoted, and the desire of the Commission to proceed thereunder, as soon as possible, to allot the residue of lands for equalization purposes.

The Commission further respectfully requests in the event that the decision of the Department in the Ard case should follow the departmental decision in the Smith case, above referred to, that the Commission be instructed definitely as to whether it should proceed without unnecessary delay to allot the residue of lands as provided in said section nine, or suspend all operations under said section so long as applications

for enrollment, involving claims to allotments, in the Creek Nation, are being made to the Commission.

Respectfully,

(Signed)

_____,
Acting Chairman.
 T. B. NEEDLES,
Commissioner.
 _____,
Commissioner.

Through the Commissioner of Indian Affairs.

(Copy.)

Be it Resolved by the National Council of the Muskogee Nation, That a special joint committee to be composed of six members from the House of Kings and twelve members from the House of Warriors be appointed to take charge of the Census rolls of the various Towns and carefully examine the same, and ascertain whether or not they are correct and if any of them are found to contain the names of non-citizens, all such names shall be expunged from the rolls and reported separately to the National Council. All the acts of the Special Committee herein provided for shall be subject to the approval of the National Council.

Adopted.

T. J. ADAMS,
Sp. Pro Tem. H. of W.

A. P. McK.,
Choka hega.

(Endorsed on Back:)

Concurred in.

THOS. W. PERRYMAN,
Pres. H. of K.

LYNCH, *Clk.*

Approved May 15th, 1895.

L. C. PERRYMAN,
Prin. Chief M. N.

Sub. No. —.

Resolution that a committee—6 from the House of Kings and 12 from the House of Warriors, be appointed to take charge of the census reports of the different towns, etc.

Approved May 15, 1895.

(Copy.)

Whereas the opinion prevails throughout the country that a large number of non-citizens have been enrolled as citizens on the different census rolls that have been made from time to time in the past; and

Whereas it is currently asserted and believed by many that a large number of claimants who have heretofore appeared before the Committees of the National Council on citizenship and other authorities of the nation, and established or obtained recognition of their claim to citizenship in the nation, accomplished the same by the undue use of money and other fraudulent means, and

Whereas all former actions involving the question of the citizenship of any person in the Muscogee nation, this nation had no representative to appear as attorney to defend her interest in that behalf therefore,

Be it enacted by the National Council of the Muscogee Nation in extraordinary session assembled. That a commission to be styled The Citizenship Commission to be composed of five (5) of the most competent citizens of this nation be and is hereby created, whose duty shall be to sit as a high court and try, determine and settle all and only such causes as shall involve the question of the right of citizenship of any person in the Muscogee Nation that shall be presented to it either by the claimant or the duly authorized representative of the nation, as hereinafter provided:

The members of the commission shall be *nominated by the Principal Chief and confirmed* by the present session of the council and shall meet as soon as practicable after their appointment and organize by electing one of their number president, and employing one competent interpreter and three (3) well qualified clerks. One clerk shall take charge of all census rolls submitted to the Commission, read and compare them with whatever other collateral matter shall be presented for that purpose and shall keep a list of all such matters and documents and stand responsible for their due preservation. One of the clerks shall preserve a docket and number of all cases and carefully and correctly record all such testimony of witnesses as the Commission shall deem worthy of record. The third clerk shall carefully, correctly and in due form record all findings of facts and decisions of the commission: issue all subpoenas, summons and calls for persons and papers ordered by it. When organized as pro-

vided, the commission shall give public notice through all the newspapers published in the nation of the time and place of its meeting at least thirty (30) days previous to such meeting. Its sessions shall be held in the Council house at Okmulgee, the first of which shall be on the second Tuesday of July, 1895. They may adjourn and meet from time to time as the interests of their business may seem to warrant, and the presence of a majority shall be sufficient for the lawful transaction of business. They shall have full authority to summon witnesses and call for persons and papers and do all other things necessary and proper to show all the facts in any case that may come before it, and in summoning witnesses the process shall be by notifying the judges of the several districts when he shall in turn subpoena the witnesses desired through their Light horsemen. All witnesses subpoenaed on part of the nation shall be paid by the nation the same *per diem* and mileage as paid to witnesses appearing before the district courts in criminal cases; and the commission shall issue certificates of indebtedness attested by the signature of the president and the recording clerk, and the national council shall at its next regular session make appropriation to cover such witness fees.

Be it further enacted. That all persons who shall appear before the commission claiming citizenship in the Muskogee Nation, and all others whose names now appear as citizens on any of the census rolls taken at any time, or on any of the public records of the nation, the validity of whose citizenship shall in good faith be questioned by any responsible citizen, shall be plaintiffs, and entitled to the right of counsel and all other rights usual and incident to the trial of a cause in a court of justice in this nation. They shall file written allegations before the commission setting forth clearly the grounds of their claim and the names of the witnesses they desire to have subpoenaed in their behalf, and shall file a bond satisfactory to the president of the commission that they will themselves pay their witnesses the same *per diem* and mileage as paid to witnesses on part of the nation. And when such allegations and witness bond are properly filed, then the commission shall subpoena the witnesses for the claimants in the same manner as witnesses for the nation are subpoenaed; and if any witness being a Muskogee citizen shall refuse to obey any subpoena of the Commission or to appear before it when duly summoned, except in case of sick-

ness or other unavoidable hindrance, he shall be fined twenty-five (\$25.00) dollars, and no property except improvements, house furniture and wearing apparel shall be exempt from seizure and forced sale to satisfy said fine. The president of the commission shall have authority to administer oath, and any witness testifying falsely under oath shall be subject to the same pains and penalties prescribed by Muscogee law for the crime of perjury; and when the attorney for the nation shall become satisfied that any citizen has sworn falsely in any cause before the commission he shall promptly report the same to the district attorney of *the district in which the accused lives*, together with such facts as he may have to justify criminal proceedings and the district attorney shall without unnecessary delay proceed to arraign and try the accused in the court of his district for the crime of perjury.

Be it further enacted, That, in the examination and adjudication of the claims of negroes to citizenship in the Muscogee nation, the provisions of the treaty of 1866 with the United States shall govern; and the subsequent acts of adoption passed by the National Council shall govern; and in cases of claim to citizenship by reason of Indian blood the act of the National Council as appears in sections 295 and 298, inclusive, of the Muscogee laws, edition 1893, shall govern, and when any case shall be decided in favor of any person by the Commission, the plaintiff shall ever afterwards be a full citizen, and accorded all the rights of any other citizen. And in any enumeration hereafter to be made of the citizens of the nation any person applying for registration, against whose citizenship any question may arise, shall be required to trace his or her origin to the rolls of the names of citizens to be prepared under this act.

Be it further enacted, That the Principal Chief shall nominate with the five commissioners herein provided for, one competent attorney who shall be well versed in the treaties, compacts and laws of the Muscogee Nation, who shall be confirmed by the Council. His duty shall be to defend the nation in all cases of claims to citizenship therein which may be filed before the Commission, to the end that no fraudulent claims may be passed by said tribunal. He shall diligently inquire into all cases of suspected fraud in the enrollment of citizens at any time; and if he shall have cause to believe that any person whose name appears on any census

roll of alleged citizens of the nation, or that any person has heretofore proved his or her rights through fraudulent means, he shall give them due notice and shall move that their names be stricken from the rolls until they shall re-establish their rights through competent testimony to the satisfaction of the Commission. All causes before this tribunal shall be decided by vote, and a majority vote shall stand and be the final decision of that body. All points of law contested before the Commission shall be decided in like manner and have the same force and effect as if decided by any other competent court.

Be it further enacted, That, each Commissioner, interpreter, clerk and the attorney for the nation, shall receive a *per diem* of four (\$4) dollars during the time they are engaged in the business herein prescribed, together with mileage at the rate of 10¢ per mile in going to and returning from their sessions.

Be it enacted further, That two thousand and five hundred (\$2,500) dollars or so much thereof as may be necessary, be and is hereby appropriated for the payment of *per diem* and mileage of members, interpreter and clerks of the Commission to be issued in warrants by the Principal Chief upon certificates issued by the president of the Commission.

Adopted after amending so as to insert the words Okmulgee District instead of "the district in which the accused lives," further amended by striking out the words "nominated by the Principal Chief and confirmed" and inserting instead the word elected.

THOS. W. PERRYMAN,
Pres. H. of K.

J. H. LYNCH, *Clk.*

Concurred in after amending so as to reduce the number of clerks from three or two.

E. B. CHILDERS,
Sp. H. of W.

A. P. McK., *Clk.*

Amendment concurred in.
J. H. LYNCH, *Clerk.*

THOS. W. PERRYMAN,
Pres. H. of K.

Approved May 30, 1895.

L. C. PERRYMAN,

Prin. Chief M. N.

Read and referred to House of Kings.

E. B. CHILDERS,

Sp. H. of W.

A. P. McK., *Cl'k.*

Whereas, there was a citizenship commission created by an extra session of the National Council of the year of 1895 to try and adjudicate claims for citizenship in the Muskogee Nation, and

Whereas, the Council creating said commission also passed laws by which the commission should be governed, viz. sections 295-296-297-298, inclusive found in Law book, edition 1893, and

Whereas, said citizenship commission has acted contrary to above sections of law and also the law creating the commission which provides that the acts of the commission shall be final, and

Whereas, the following named families: W. E. Throckmorton and family, Ether Durant and family, Dr. Turvin and family, Thompson Rowley and family were tried and rejected by the commission in 1895, and

Whereas, in August, 1896, the citizenship commission reconsidered the above cases and admitted them contrary to the law making the former action final and in violation of the above-named sections, and

Whereas, W. B. Self and family were admitted to full citizenship by said citizenship commission in violation of sections 85 and 86 of pages 38 and 39 edition of 1893, and

Whereas, the evidence of W. B. Self, has, since his admission to citizenship, been the cause of a great many others being admitted—

Therefore—

Be it enacted by the National Council of the Muskogee Nation, That there be and is hereby created a committee of five, three from the House of Warriors and two from the

House of Kings, to investigate and adjudicate the charges set forth in this bill.

Adopted.

G. A. ALEXANDER,
Prest. H. of K.

J. H. LYNCH, *Clerk.*

Concurred in.

T. W. PERRYMAN,
Sp. H. of W. pro tem.

A. P. McK., *Clerk.*

Nov. 6, 1896.

Book No. 1, pp. 12-13-14.

MUSKOGEE, INDIAN TERRITORY,
January 30, 1901.

Hon. H. L. Dawes, Pittsfield, Massachusetts.

MY DEAR MR. DAWES:

* * * * *

I am not quite sure about General Porter's attitude. It appears from some of the newspaper reports which are coming to the Territory, that he proposes to inject some provisions in the treaty which will be exceedingly vicious. He has had offered an amendment which provides that the rolls of citizenship of the Creek Nation after being prepared by the Dawes Commission, must be submitted to the Creek council for revision, before going to the Secretary of the Interior. This would open up the question of citizenship anew and give the tricksters and Creek council an opportunity to inaugurate another carnival of corruption. It may be that General Porter is misquoted. At any rate, I hope the Commission will not be led astray and make this change, which will nullify the work of the Commission which has cost the Government many thousands of dollars.

* * * * *

Sincerely yours,
(Signed)

TAMS BIXBY.

(Copy.)

Executive Office,

Muskogee Nation,

P. Porter, Principal Chief.

November 27, 1901.

Honorable House of Kings & Warriors.

GENTLEMEN: I herewith transmit you a communication from A. P. McKellop and H. C. Reed, Representatives of Creek Nation before the Dawes Commission, accompanied by resolution.

The resolution is self-explanatory, and I think deserves your favorable consideration, as it will be in the direction of protecting the interests of the Creek Nation against the participation in our lands of persons who are not really entitled to citizenship.

Very respectfully,
(Signed)

P. PORTER,
Principal Chief.

Read and referred to H. of Warriors 11/27/1901.

T. W. PERRYMAN,
Pres. H. of Kings.

LEE McNEVINS, *Clerk.*

OKMULGEE, IND. TER., November 27, 1901.

Hon. P. Porter, Principal Chief, Muskogee Nation.

DEAR SIR: We submit herewith a resolution requesting that the Creek roll be withheld from final approval until the nation can submit evidence that a large number of names are enrolled on said roll of those who were never legally admitted or adopted to citizenship in this nation. We understand that rolls will soon be ready for transmittal to the Secretary of the Interior and if any action is to be taken for the protection of the interests of the nation by the correction of said rolls it should be done without delay. The accompanying resolution is intended to delay the final approval of the rolls, which if approved at once will result in great loss to the Creek people.

We respectfully request that the resolution be submitted to the National Council with such remarks thereon as you may deem proper in the matter.

Very respectfully,

(Signed)

"

A. P. McKELLOP,
H. C. REED.

(Copy.)

Be it Resolved by the National Council of the Muskogee Nation, That whereas the Commission to the Five Civilized Tribes, known as the Dawes Commission, is now engaged in completing the roll of citizens of the Creek Nation preparatory to submitting them to the Honorable Secretary of the Interior for final approval; and,

Whereas, the records of said Commission show that there are now upon the cards of said Commission, to be enrolled as citizens of the Creek Nation, the names of eight hundred and forty-three freedmen, or free colored persons, who were never adopted by the National Council of the Muskogee Nation, and whose names, or the names of their ancestors, do not appear upon the Dunn roll, which roll was confirmed by act of Congress of June 28, 1898, known as the Curtis act, and which was also confirmed by the late agreement, ratified by the National Council on May 25, 1901; and,

Whereas, there are a number of names enrolled of persons who claim to be Creek citizens by blood who have never been legally adopted by the National Council, and

Whereas, the Dawes Commission noted the fact of such enrollment in their report to the Honorable Secretary of the Interior for the fiscal year ending June 30, 1899, in which appears on page 13 of said report the following words: "Many of those now claiming have been recognized by the tribe as citizens and been enrolled one or more times on tribal rolls, without having been admitted by act of Council or otherwise legally acquiring such enrollment. That a monetary consideration has been the medium by which both freedmen and others have in some instances gained admission to the tribal rolls cannot be questioned;" and,

Whereas, if the opinion held by the Dawes Commission, that the fact that any person was enrolled and participated in any per capita payment made of such person a citizen, al-

ugh there had not been any previous act of adoption by Council, over one thousand persons will be allotted lands, and will participate in the distribution of other properties of the Creek people who were never lawfully admitted or accepted as members of the Creek Tribe.

Therefore, realizing the great interests involved, amounting to over one million dollars in land and money, the National Council of the Muskogee Nation, in regular session assembled, would respectfully request the Honorable Dawes Commission to withhold the sending of the rolls containing the names of such persons to the Honorable Secretary of the Interior until said Nation, through its recognized attorneys, can fully present evidence to said Commission showing said persons not entitled to enrollment, and would respectfully request the Honorable the Secretary of the Interior to instruct said Commission to permit said nation to, within ninety days after the approval of this resolution, make proof at said parties so noted upon a separate roll by the Honorable Dawes Commission, as not having been found upon the Dunn roll, or as not being descended from any person whose name is found upon the Dunn roll are not entitled to citizenship and others claiming citizenship by blood whose rights are questioned by the recognized attorneys of the Muskogee Nation, and to establish to the satisfaction of said Commission, that whatever enrollment of said names was had, was obtained by fraud, and without authority of law, in order that said Commission may intelligently pass upon the rights of said persons to citizenship in the Creek Nation.

Be it further resolved, That the Principal Chief shall request of the Dawes Commission a list of the names of said eight hundred and forty-three persons, so about to be enrolled by the Dawes Commission, and others claiming citizenship by blood whose rights are questioned by the recognized attorneys of the Muskogee Nation, in order that a formal protest may be filed against the said enrollment, and that proof may be submitted in support of the contention of the Muskogee Nation therein.

Be it further resolved, That the Principal Chief is hereby directed to send a certified copy of this resolution to the Honorable Secretary of the Interior, and also a copy to the Dawes Commission.

Adopted November 30, 1901.

(Signed)

AMOS McINTOSH,
Speaker, House of Warriors.

(Signed) A. P. McKELLOP, *Clerk.*

Concurred in November 30, 1901.

(Signed)

T. W. PERRYMAN,
President House of Kings.

LEE McNEVINS, *Clerk.*

Approved December 2, 1901.

(Signed)

P. PORTER,
Principal Chief, Muskogee Nation.

(Copy of Telegram to Secretary on p. 196, in Book 7.)

Paid Gov't.

MUSKOGEE, I. T., July 11, 1902.

Secretary of Interior, Washington, D. C.

Indications point to employment of corrupt influences on part of interested persons to prevent ratification of Creek agreement. Impression prevails that direct bribery has been indulged in in connection with tribal legislation for years. Commission believes no effort should be spared to bring about proper prosecution of such offences and frustrate the movement on this occasion by immediate precautionary measures. We recommend the immediate detail of secret service officers, or, if impracticable, authority to employ suitable agents. Necessity is urgent. Special session council called July seventeenth.

BIXBY,
NEEDLES,
BRECKINRIDGE,
Commissioners.

O. B. G. R.

(Copy of Departmental Letter on p. 17, in Book 14.)

MUSKOGEE, INDIAN TERRITORY, June 25, 1903.

The Honorable the Secretary of the Interior.

SIR: We inclose copy of a telegram of the 20th inst. from Washington to the Globe-Democrat of St. Louis, and pub-

ished in the issue of the 21st inst. of that paper, alleging, upon the authority of Mr. Pliny Soper, U. S. District Attorney for the Northern Judicial District of Indian Territory, extensive frauds "with the allotment of lands to the Indians and with the enrollment of the tribesmen in preparation for the final dissolution of the tribal relations." The telegram is headed "Alleged Frauds in Indian Territory Land Allotments," startling "disclosures" are said to be expected as a result of investigation, Federal officials are said to be involved in a "scandal," and the entire purport of the dispatch is to the effect that conditions of this character exist in Indian Territory, in which Territory the enrollment of the Indians and the allotment of their lands are exclusively under the jurisdiction of this Commission, subject to the general authority of the Secretary of the Interior.

Mr. Soper is one of the officials upon whom this Commission is dependent, under the law, for the prosecution of persons charged with illegal practices. Statements of this character from him are entitled to great weight with the Department and the public, the confidence of both of which it is highly important for the Commission to possess.

In view of the foregoing we request that you communicate the inclosed telegram to Mr. Soper, and ask if he made or authorized any statement therein contained reflecting upon the integrity of the work of this Commission.

Very respectfully,

TAMS BIXBY,

Chairman;

C. R. BRECKINRIDGE,

W. E. STANLEY,

Commissioners.

*Excerpt from First Annual Message, Second Term, P. Porter,
Prin. Chief, Annual Session, October 4, 1904.*

To the Honorable Members of House of Kings and Warriors.

GENTLEMEN:—

* * * * *

CITIZENSHIP.

Attention has been called to the fact that quite a number of people have been enrolled as Creek citizens and entitled

to allotments who, if their cases were fully investigated, would be found to be neither Creek citizens by blood or adoption. Quite a number of these were passed upon when the court had jurisdiction over the determination of citizenship matters. The Creek Nation did not make an appearance in many cases and they were adjudged to be citizens upon the evidence presented by them. Thereafter all these cases were affirmed by agreement. In other cases claimants procured false evidence and were enrolled and allotments made for them who died prior to April 1, 1899, who would have been entitled to allotments had they been living at that time. Doubtless in some of these cases allotments have been made and deeds delivered to them, but it is neither the desire of the Creek people nor the Government to wrong those entitled to allotments by taking a part of their patrimony and giving it to those who have no right to it. Means should be instituted to investigate all the cases, and for this purpose I would recommend that you, by resolution, petition Congress to have a citizenship court appointed in like manner and with like power as has been appointed for the Choctaw and Chickasaw so that it will enable the Nation to present these cases for full adjudication.

* * * * *

(Book 37, p. 48.)

MUSKOGEE, INDIAN TERRITORY, September 13, 1906.

The Honorable the Secretary of the Interior.

SIR: I have the honor to acknowledge receipt of Departmental letter of August 22, 1906 (I. T. D. 10162-1906), advising that the Department on June 6, 1906, in conformity with my recommendation of June 2, 1906, recommended that an item making an appropriation of \$100,000 be inserted in the Deficiency Appropriation bill, in order to enable this office to carry on the work under my supervision for the fiscal year ending June 30, 1907.

Congress having failed to make such additional appropriation of \$100,000, and prompt action being desired by the Department in the matter, in order that the necessary funds may be provided by Congress at its next session, I am requested to furnish an itemized estimate of the amount necessary to carry on the work under my supervision for the present fiscal year.

June 2, 1906, I had the honor to wire the Department as follows:

"Secretary of the Interior, Washington, D. C.:

"Find upon return to the office that since passage of Curtis Act our business has increased enormously. The work incident to reception and disposition of applications for enrollment of minor children, the great number of motions for rehearing and review now being filed, the marked increase of work in the land offices, the expenses of delivery of deeds, and the necessarily large increase in all divisions incident upon the passage of the Act of April twenty-six, nineteen hundred and six, convinces me that item of two hundred thousand dollars in Indian Appropriation bill will be insufficient for work under my supervision for next fiscal year. It is urgently recommended that Congress be requested to make provisions in the Deficiency bill for an additional appropriation of one hundred thousand dollars for this office for fiscal year ending June thirtieth, nineteen hundred and seven.

BIXBY,
Commissioner."

The Act of Congress approved June 21, 1906 (Public No. 258), entitled:

"An act making appropriations for the current and contingent expenses of the Indian Department for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and seven.

provided in reference to the work under my supervision and direction as follows:

For the completion of the work heretofore required by law to be done by the Commission to the Five Civilized Tribes, two hundred thousand dollars. Said appropriation to be disbursed under the direction of the Secretary of the Interior."

I have the honor to report that the expenses for the first quarter of the fiscal year ending June 30, 1907, will amount to about sixty-five thousand dollars.

With the present number of employees and the incidental and miscellaneous expenses, it will require from sixty-five to seventy thousand dollars a quarter to carry on the work under my supervision and direction during the present fiscal year. I do not see that any decrease can be made during the year in the number of employees of any of the divisions, and in certain branches of the work, I believe that it would be advantageous to increase the force so that all matters that could possibly receive consideration be disposed of during the present fiscal year.

In the Creek Nation I have no doubt that investigation will be required in large number of cases of persons now enrolled, and who have received allotments, but where the office has been apprised of an attempted fraud in securing such allotments.

The data secured by a field party in the Choctaw Nation has also resulted in the securing of considerable testimony showing a number of fraudulent allotments in the Choctaw and Chickasaw Nations, and it is probable that a considerable number of such frauds were also attempted in the Cherokee Nation. In my opinion all these cases should be investigated before the work under my supervision and direction is completed, and I can see no better time for these investigations than during the present fiscal year, and before the completion of the delivery of deeds and patents to the citizens of the Five Civilized Tribes.

No patents have been prepared to the present time to allottees of the Seminole Nation or Mississippi Choctaws and as soon as the forms of conveyance are approved, I anticipate the preparation, checking and delivering of patents to citizens of the Seminole Nation, and to Mississippi Choctaws.

The act of Congress approved April 26, 1903 (Public No. 129), provides:

"That the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date.

If this provision of law is to be made effective, a considerable increase in the legal and clerical force of all the enrollment divisions must be made at an early date, in order that the consideration and disposition of pending applications shall be completed prior to March fourth, nineteen hundred and seven.

I, therefore, have the honor to recommend the appropriation of an additional sum of Seventy-five thousand dollars, to supply deficiencies in the appropriation made for the work under my supervision and direction for the fiscal year ending June 30, 1907.

Proposed item for insertion in an act entitled,

"An act making appropriations to supply urgent deficiencies in appropriations for the fiscal year ending June 30, 1907, and for prior years, and for other purposes.

To supply a deficiency in the appropriation for the completion of the work heretofore required by law to be done by the Commission to the Five Civilized Tribes and its successors, the Commissioner to the Five Civilized Tribes, including all objects mentioned under this title of appropriations as provided in the act of Congress approved March 3, 1905 (33 Stats., 1060), and June 21, 1906 (Public No. 258), making appropriations for the current and contingent expenses of the Indian Department for the fiscal year ending June 30, 1906, and June 30, 1907, being the amount absolutely required to complete the unfinished work devolving upon the Commissioner to the Five Civilized Tribes for the fiscal year ending June 30, 1907, Seventy-five thousand dollars; said appropriation to be disbursed under the direction of the Secretary of the Interior."

October 4, 1905, I had the honor to submit for the consideration of the Department a detailed estimate of appropriation required for the work under my supervision and direction for the fiscal year ending June 30, 1907, of \$201,600. Since the submission of this estimate considerable additional work has been entrusted to the Commissioner to the Five Civilized Tribes by the provisions of the Act of Congress approved April 26, 1906 (Public No. 129), and June 21, 1906 (Public No. 258).

It is somewhat difficult to submit an estimate in detail of the distribution of the additional appropriation of seven thousand five hundred dollars as submitted, but as the expenses of this office are now somewhat in excess of the estimate submitted in my letter of October 4, 1905, I am convinced that an additional sum of Seventy-five thousand dollars will be absolutely necessary to carry on the work of this office during the present fiscal year, and that if the additional Seventy-five thousand dollars is not appropriated by Congress, a curtailment in the force of employees will be necessary, which will be detrimental to the early disposition of matters requiring the attention of this office and the Department.

Respectfully,
(Signed)

TAMS BIXBY,
Commissioner.

Through the Commissioner of Indian Affairs.

(Copy of Letter on p. 45, in Book 15.)

Telegram.

(No Date.)

Secretary of Interior, Washington, D. C.:

Widespread and continued newspaper criticism of most serious character, involving integrity of our work and our fidelity to duty, impels us to request that an immediate and searching investigation be instituted and that the President be informed of this desire. A work unparalleled in the history of civilization, the result of years of unremitting toil is threatened by fanatical reports and questionable journalism. We urge that there be assigned to the work of investigation one whose reputation for honesty, ability and fearlessness is well established, and whose findings will be universally accepted.

TAMS BIXBY.
T. B. NEEDLES.

An Act to Provide Payment of Actual Necessary Expenses in Fraudulent Enrollment and the Application for Enrollment.

Whereas, there is a large number who by fraud, false swearing, and the aid and connivance of unscrupulous attorneys, have succeeded in having themselves declared Creek Citizens and thereby obtained allotments of 160 acres of land, and whereas sufficient work has already been done under the last appropriation to demonstrate beyond a reasonable doubt that this state of affairs does actually exist, and names of witnesses have been obtained by whom these frauds can be established, and

Whereas, it is impossible to secure the attendance of witnesses without some provision is made for the paying to them of per diem and mileage, and

Whereas, the urgent necessity for this fund exists and that the Creek Nation may be fully and properly protected from fraudulent enrollments and applications for enrollment; therefore,

Be it enacted by the National Council of the Muskogee Nation, That there be and is hereby appropriated out of the general fund of the Creek Nation, not otherwise appropriated, the sum of Eight Thousand Dollars (\$8,000.00), or so much thereof as may be necessary for the payment of per diem and mileage of witnesses and other actual necessary expenses for the purpose of investigating the fraudulent enrollment and application for enrollment for citizenship in the Muskogee Nation, said sum to be paid out under such rules and regulations as may be prescribed by the Secretary of the Interior for the disbursements of Creek funds.

Be it further enacted, That all expenditures under this act, shall be upon vouchers taken by the National Attorney duly signed by each and every one receiving any part of the same, all vouchers to be deposited with the Principal Chief to the end that a correct and accurate accounting may be had of all expenditures under this act.

Adopted Nov. 2, 1906.

ALEX DAVIS,
Speaker House of Warriors.

MILDRED CHILDERS, *Clerk.*

Concurred in Nov. 2, 1906.

SAM HAYNES,
Pres. House of Kings pro Tem.

SAM GRAYSON, *Clerk.*

Approved Nov. 2, 1906.

P. PORTER,
Prin. Chief.

54696.

F. H. E.

Department of the Interior, Washington.

I. T. D. 6340-1903.

August 25, 1903.

Commission to the Five Civilized Tribes, Muskogee, Indian Territory.

GENTLEMEN: Inclosed herewith you will find a copy of the opinion of the Assistant Attorney General, dated August 20, 1903, approved by the Secretary on the same day, upon your report transmitting deeds issued to John S. Meagher, deceased Creek allottee.

The opinion states that the deeds should be issued to the heirs of decedent, for the reasons set forth therein.

You are directed to act in accordance with the views expressed in said opinion.

Respectfully,

H. W. MILLER,
Acting Secretary.

1 inclosure.

[Endorsed:] Indexed. 54696. No. 24360. Sept. 8, —. 11/4/03 J. G. F. Department, Miller, Washington, D. C., August 25, 1—. Transmits copy of approved opinion of Assistant Attorney General upon report of Sec., transmitting deeds issued to John S. Meagher, deceased Creek.

I. T. D. 5908-1903.

J. R. W.

W. C. P.

Office of Assistant Attorney General for the Interior
Department.

WASHINGTON, August 20, 1903.

The Secretary of the Interior.

Sir: I am in receipt of the reference by the Acting Secretary of the communication of July 27, 1903, of the office of Indian Affairs (Land 45,723, 1903), and its enclosures, respecting the deeds to be issued in case of John S. Meagher, deceased, a Creek Indian, for allotment of lands under the acts of March 1, 1901 (31 Stat., 861, 862-4), and June 30, 1902 (32 Stat., 500-2).

It appears by the communication and enclosures that John S. Meagher, an enrolled citizen of the Creek Nation, died December 12, 1899, having theretofore applied for part of the lands which he was entitled to be allotted, amounting to one hundred and twenty acres, of which he designated one forty acre tract as his homestead. Subsequent to his death his heirs applied for allotment of the other forty acres to which he was entitled. The allotments were certified by the Commission to the Five Civilized Tribes, which prepared three deeds—one to John S. Meagher for the homestead tract, one to him for the eighty acres of allotment land not designated as a homestead, and one to "the heirs of John S. Meagher" for the tract allotted after his death.

June 16, 1903, the Department (I. T. D. 5422-1903), returned the deeds without approval, requesting the commission to submit an explanation why the deeds were issued to different persons and to report upon the advisability of issuing one deed for the one hundred and sixty acres to the heirs of John S. Meagher. July 17, 1903, the Commission made its report giving reasons which in its opinion precluded the conveyance by a single deed. July 27, 1903, such report was transmitted to the Department by the Commissioner of Indian Affairs, expressing the opinion, and reasons therefor, that a single deed embracing all the land might properly issue to the heirs of John S. Meagher as grantees. August 6, 1903, the letter of the Acting Secretary, reciting the facts, referred the matter and enclosures to me—

for an opinion, not only as to the legality of the forms inclosed herewith, but also with the request

that you indicate what should be the proper practice in conveying the allotted lands, where the allottee has died, leaving children "born to him after May 25, 1901."

Paragraph 16 of the supplemental agreement with the Creek Indians ratified by act of June 30, 1902 (32 Stat., 500), contains provisions as to the alienation of allotted lands, as to their liability to be taken to satisfy debts, and as to their taxability, as follows:

"Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

"Selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons, who cannot select for themselves, may be made in the manner provided for the selection of their allotments, and if for any reason such selection be not made for any citizen it shall be the duty of said Commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity.

It is thus seen that the limitations of the estate as to taxability, alienation, liability for debts, and the rule of descent are different in respect to the homestead from other allotted lands. The statute requires a separate deed for the homestead. That is, of course, a sufficient and controlling reason for making a separate deed therefor.

As to the other allotted lands no reason appears in the statute for a deed different in form in the case of lands selected by the allottee in his lifetime, not conveyed till after his death, and lands selected in his right by his heirs after his death. In either case the lands descend to the same class of heirs, the general heirs of decedent, and not to particular heirs, and all such lands may, in my opinion, be conveyed by one deed.

The proper practice in conveying allotted lands where the allottee has died prior to conveyance, in my opinion, is to make the deed run to "the heirs of" the allottee naming the decedent. A patent or grant to a deceased person is void at law. *Galloway vs. Findley* (12 Pet., 264, 298); *Davenport vs. Lamb* (13 Wall., 418, 427); *McCracken's Heirs vs. Beall* (3 A. K. Marsh, Ky., 210); *Hunter vs. Watson* (12 Cal., 363, 73 Am. Dec., 543). As to patents by the United States to public lands this rule is changed by the act of May 30, 1836 (5 Stat., 31; sec. 2448 R. S.), but the language of that provision is not broad enough to include the deed of an Indian tribe for allotted lands though such conveyance is made under a law of the United States. In the last above cited case from California it was held that a deed to "K and his heirs" made after K's death was ineffectual to convey title, and that the word heirs was a mere word of limitation and not one of purchase, and had no effect to vest or convey a title.

I am therefore of opinion that where these deeds are to be executed for the benefit of the heirs of deceased allottees they should be executed to "the heirs of," &c., naming the decedent, and should not be issued to, or in the name of, the deceased as the grantee therein.

In case of a homestead the deed should be in the same form, but describe the land as the deceased's homestead. It being described as the homestead, and the deed showing upon its face that it is made pursuant to the statute which is therein referred to, the statute governs and limits the estate conveyed first to heirs of the body, that is, "heirs born

to" the deceased after May 25, 1901. In default of such heirs the deed will have effect and inure to the heirs generally, which it could not do if limited to the particular heirs born since May 25, 1901.

Very respectfully,

F. L. CAMPBELL,
Assistant Attorney-General.

Approved, August 20, 1903.

E. A. HITCHCOCK,
Secretary.

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Copy.

Refer in reply to the following: Land 35195-1904, 35415-1904.

Department of the Interior,

Office of Indian Affairs,

WASHINGTON, June 2, 1904.

The Honorable the Secretary of the Interior.

SIR: There is enclosed herewith a report from the Commission to the Five Civilized Tribes forwarding 484 deeds to the heirs of deceased citizens of the Creek Nation, which they request authority to cancel. Each deed covers an allotment of 160 acres, and the Commission say that under the opinion of the Assistant Attorney General of August 20, 1903, they should be cancelled and separate deeds covering a homestead of 40 acres and an allotment of 120 acres issued in lieu of the single deeds. They recommend that the authority requested be granted.

There is enclosed a report of the Commission dated May 24, 1904, in which they refer to their letter of May 23, and say that none of the deeds transmitted have been delivered to the allottees. The deeds enclosed are as follows:

Roll No.	Deed No.	File No.	Name.
C. 8790	10035	6419	Heirs of Willie Tulsa.
C. 377	21198		Monnie.
C. 6967	21199		Katie Davis.
F. 3464	21403		Ned Williams.
F. 3279	21402		Lonie Tucker.
C. 2470	7871		Eliza Tecumseh.
C. 6141	20774	11975	John Brook.
C. 6459	20775	11976	Betsey Scott.
C. 5330	20318	11965	Hugh Warden.
F. 4232	20319	11966	Isaac Tucker.
C. 6362	20320	11967	Katie Starr.
C. 6625	20321	11968	James Narcome.
C. 6629	20322	11969	Lydia Karlarney.
C. 520	20323	11990	Mary Knight.
C. 801	20324	11971	Wilson McKellop.
C. 825	20325	11972	Eli Tiger.
F. 2651	20327	11974	Ethel May Lyons.
C. 6538	20777	11978	Hettie Gray.
C. 6467	20776	11977	Minnie Lindsey.
C. 5815	16090	8711	Emanuel Bruner.
C. 3786	5848	6356	Fred Adams.
C. 6958	10109	6493	Thomas Adams.
C. 4007	15499	7920	"Annie."
C. 4036	5828	6336	Parnoskey Ahfonoke.
C. 4034	5849	6357	Ahfonoke.
C. 5161	5782	6291	Lewis Alexander.
C. 6002	15510	7931	Nathan Alexander.
C. 7920	15540	7961	Ar-tar-kin-nay.
C. 4173	5835	6343	Olla Aubrey.
C. 5528	16088	8709	Tyler Andreson.
C. 4685	5809	6318	Narto Anderson.
C. 9075	10030	6414	Lottie Anderson.
C. 6522	10153	6537	Alma Anderson.
C. 7886	15534	7955	Charles Anderson.
C. 1343	5780	6289	Judie Barnette.
C. 4594	5813	6322	Eliza Barnett.
C. 7386	15532	7953	Louisiana Barnett.
C. 8750	10019	6403	Timothy W. Barnett.
C. 8406	10166	6550	Louis Barnett.
C. 8000	10270	6654	Winnie Gano.
C. 7474	10069	6453	David Gooden.
C. 9599	10231	6615	Helen Hardridge.
C. 4259	5829	6337	Chemona Harjo.

Roll No.	Deed No.	File No.	Name.
C. 4258	5830	6338	Tulmochus Harjo.
C. 4055	5838	6346	Thaneda Harjo.
C. 2413	5873	6381	Wilyarmy Harjo.
C. 8649	10278	6662	Hulbutta Harjoche.
C. 1700	15492	7914	Willie Land.
C. 3534	5859	6367	Sam Lasley.
C. 8335	10160	6544	Lewis Lasley.
C. 8028	10275	6659	"Laslie."
C. 7736	10191	6575	Mollie Lakey.
C. 4016	5842	6350	John Lewis.
C. 7954	15542	7963	Leider.
C. 7883	10180	6564	Leetcher.
C. 6927	10014	6398	Thomas Little.
C. 7960	15545	7966	Sarah Littlehead.
C. 5837	16091	8712	Clara Belle Baker.
C. 8835	10225	6609	Mary Ann Barnett.
C. 7394	10076	6460	Mannie Bear.
C. 4566	5816	6325	Martha Ben.
C. 3040	5864	6372	Helay Behen.
C. 8613	10027	6411	Sophia Bigpond.
C. 8614	10048	6432	Martha Bigpond.
C. 7520	10021	6405	Lottie Bighead.
C. 7522	10061	6445	Nancy Bighead.
C. 7421	10074	6458	Lucy Birdhead.
C. 7219	10095	6479	Polly Bird.
C. 7735	10192	6576	Wisey Blackgrass.
C. 9035	5820	6382	Jennie P. Boles.
C. 1567	5776	6285	Ural Boone.
C. 9484	15570	7991	Madge Boone.
C. 2160	5771	6280	Charles Eberle Bruner.
C. 2868	5753	6262	James Brown.
C. 2967	5870	6378	Jennie Brown.
C. 5576	16086	8707	Winfield Bruner.
C. 5734	16089	8710	Georgia Bruner.
C. 1387	5778	6287	Nannie Bright.
C. 6269	10106	6490	James Brown.
C. 7187	10039	6423	Lillie Bruner.
C. 7405	10075	6459	Lizzie Bruner.
C. 7188	10097	6481	Jemime Bruner.
C. 8999	10212	6596	Nellie Bruner.
C. 7100	10292	6676	Jackson Bruner.
C. 8569	10000	6384	Nina Brook.
C. 8570	10001	6385	Nina T. Brook.

Roll No.	Deed No.	File No.	Name.
C. 7772	10025	6409	Emma Brooks.
C. 5648	15504	7925	Barney Burgess.
C. 595	5762	6271	Ben Bullet.
C. 681	5765	6274	Sam Butler.
C. 8948	10214	6953	John Butler.
C. 9282	10253	6637	Cleveland Bushyhead.
C. 8856	10223	6607	Sandy (Leader) Byrd.
C. 9258	10242	6626	Jim Goody.
C. 7506	10063	6447	Cinda Green.
C. 6796	10143	6527	Louisiana Green.
C. 2489	5750	6259	Charley Grayson.
C. 166	5784	6293	Sophia Grayson.
C. 8581	10005	6389	Roley Grayson.
C. 7114	10044	6428	Mary Grayson.
C. 7512	10022	6406	Comne Gray.
C. 8428	15550	7971	Susan Grayson.
C. 7511	10295	6679	Dosey Gray.
C. 7302	10103	6487	Silanie Gray.
C. 1231	5774	6283	Annie Kanard.
C. 7217	10291	6675	Tilda Kanard.
C. 9486	15571	7992	Hully Kanard.
C. 7090	16094	8715	Lizzie Kanard.
C. 8393	10028	6412	Barney Kano.
C. 8278	10117	6501	Marker Kano.
C. 8390	10164	6548	John Kano.
C. 4282	5827	6335	Louis Kernal.
C. 3461	5755	6264	Louie Kelly.
C. 8647	10279	6663	Katy Key.
C. 8646	10280	6664	Naggy Key.
C. 8247	10298	6682	George Kenny.
C. 6525	15523	7944	Washington Kanard.
C. 6176	10233	6617	Chotkey King.
C. 6177	10263	6647	Louisa King.
C. 6686	10289	6673	Willie King.
C. 9463	10232	6616	Jasper Knight.
C. 8168	10284	6668	Konahe.
C. 4366	5823	6331	Webiley Maharkey.
C. 6627	10138	6522	John Narcome.
C. 6626	10139	6523	Sunday Narcome.
C. 9270	10245	6629	Havey.
C. 5983	15512	7933	Johnie Nevey.
C. 5982	15513	7934	John Nevey.
C. 6421	10146	6530	Alice Partridge.

Roll No.	Deed No.	File No.	Name.
C. 7482	10294	6678	Minnie Parnosky.
C. 7950	10089	6473	"Petelle."
C. 7158	10041	6425	Ellen Peters.
C. 9017	10031	6415	Louis Perryman.
C. 9429	15568	7989	Georgia R. Perryman.
C. 6344	5779	6288	Dave Pigeon.
C. 2281	5747	8—6	William R. Pitts.
C. 7568	10207	6591	Tobbe Porter
C. 6359	10107	6491	Walter Polk.
C. 6358	10144	6528	Delilah Polk.
C. 7837	10257	6641	Silla Polk.
C. 9236	10237	6621	Jeannetta Proctor.
C. 5700	15505	7926	Peter Randall.
C. 3557	5857	6365	Lucy Reynolds.
C. 6793	10120	6504	Eliza Reynolds.
C. 7204	10096	6480	Leah Reed.
C. 4179	5834	6342	Richmond.
C. 9021	10210	6594	Willie Riley.
C. 6787	10228	6612	Parfna Riley.
C. 8785	15553	7974	Johnson Riley.
C. 9525	15544	7965	Jack Albert Rodgers.
C. 9013	15561	7982	Vina Sampson.
C. 4218	5832	6340	Elsie Sampson.
C. 3544	5867	6375	Bertha Sango.
C. 5849	15516	7937	Miley Sands.
C. 4928	5795	6304	Hully Sand.
C. 3284	5861	6369	Phoebe Sapulpa.
C. 4850	5800	6309	Lucinda Sammy.
C. 8125	10273	6657	Sak-yo-thli-ke.
C. 6906	10126	6510	Sak-ka-senny.
C. 8572	10003	6387	Salmer.
C. 8580	10004	6388	Sarnochka.
C. 6789	10121	6505	Sartolumka.
C. 7697	10024	6408	George Schrimsher.
C. 7041	10081	6465	Lona Scott.
C. 7040	10082	6466	Polly Scott.
C. 6412	10147	6531	Annie Scott.
C. 6411	10148	6532	Kissie Scott.
C. 6410	10149	6533	Sowitee Scott.
C. 6165	10264	6648	Louisa Scott.
C. 5965	15514	7935	Sampson Scott.
C. 6529	19152	6536	Tom Segro.
C. 7255	10099	6483	Angeline Sewell.

Roll No.	Deed No.	File No.	Name.
C. 7254	10100	6484	Frank Sewell.
C. 4337	5824	6632	Sealie.
C. 7784	10187	6571	Selina.
C. 5379	5794	6303	Semarte.
C. 9274	10249	6633	Setehme.
C. 7669	10201	6585	Se-yo-ke.
C. 7931	15539	7960	She qua bee.
C. 6161	10105	6489	Sallie Simmer.
C. 3721	5853	6361	Silpee.
C. 7871	15537	7958	Moses Simmons.
C. 9064	10209	6593	Nicey Sizemore.
C. 7676	10200	6594	Sin-ki-ye.
C. 7523	10060	6444	Aggie Smith.
C. 3299	10119	6503	Barney Smith.
C. 8438	10171	6555	Chatham Smith.
C. 6718	10154	6538	John Smith.
C. 8384	10163	6547	Sarty Smith.
C. 8439	10170	6554	Martin Smith.
C. 8126	10274	6658	Katcha Fixeco.
C. 7456	10293	6677	Sildy Cain.
C. 4939	5791	6300	Rosanna Canard.
C. 3046	5869	6377	Agie Cahkokethlon.
C. 6708	15574	7945	Maggie Cahtahwon.
C. 6878	10053	6437	Susan Cedar.
C. 9494	15574	7995	Thomas Childers.
C. 9235	10236	6620	Daisy Childers.
C. 6334	15518	7939	Lucy Chisholm.
C. 4914	5798	6703	Katie Chupco.
C. 5036	5788	6297	Chamela.
C. 8866	15557	7978	Sam Charles.
C. 8870	15558	7979	David Charles.
C. 8940	10216	6600	Wilburn Chief.
C. 8940	10216	6600	Wilburn Chief.
C. 8380	10159	6543	Cho fo lo che.
C. 8519	10285	6369	Cinda.
C. 9289	10256	6640	Charles Cloud.
C. 9290	10258	6642	Mary Cloud.
C. 6748	10142	6526	William E. Colmon.
C. 7763	10189	6573	John Coffee.
C. 5111	5785	6294	Lizzie Coachman.
C. 3351	5863	6371	Peter Coachman.
C. 9284	10255	6339	Nellie Colbert.
C. 9502	15575	7996	Ludie Cox.

Roll No.	Deed No.	File No.	Name.
C. 5620	15503	7924	Willie Colbert.
C. 9431	15569	7990	Linda Colbert.
C. 1620	5775	6284	Birl Combs.
C. 7786	10184	6563	Lucy Conner.
C. 7785	10186	6570	Adam Conner.
C. 4416	5821	6329	Norma Collins.
C. 8796	10034	6418	Sunday Collins.
C. 4833	5802	6311	Liza Coney.
C. 7986	15548	7969	Nessie Coonhead.
C. 7513	10062	6446	Lader Coon.
C. 8280	10118	6502	Lumsey Coon.
C. 4865	5817	6326	Nelissey Cornells.
C. 5457	5826	6334	Annie Cornell.
C. 8777	10018	6402	Co-nah-ke.
C. 9269	10244	6628	Imly.
C. 7574	10206	6590	Topley Isopocogee.
C. 6783	10122	6506	Jennie Jacobs.
C. 6782	15526	7947	Stephen Jacobs.
C. 6951	10051	6435	Lucy Jackson.
C. 6952	10110	6494	Ceaser Jackson.
C. 6953	15530	7951	Wiley Jackson.
C. 4587	5815	6324	Hully Jacob.
C. 6905	10127	6511	Jennie Jack.
C. 6904	10058	6442	Sam Jack.
C. 7126	10042	6426	Jackey.
C. 4294	10179	6563	Nathan Noon.
C. 9078	10029	6413	Jackson Jack.
C. 8516	5862	6370	Prince Jefferson.
C. 7276	10098	6482	Timmie Jessee.
C. 4224	5831	6339	Adam Johnson.
C. 9279	10038	6422	Susie Johnson.
C. 8220	10169	6553	Soney Jones.
C. 9252	10240	6624	Lucy Sullivan.
C. 425	5763	6272	Togy Sugar.
C. 8404	10165	6549	Phillip Stand.
C. 5367	5790	6299	Wilson Standwaitie.
C. 2214	17336	9216	Frank Evans.
C. 7001	10083	6467	Billy Euchee.
C. 8513	5844	6352	William Eufaula.
C. 9368	10262	6646	Sampson Emarthloche.
C. 7748	10296	6680	Tom Emarthla.
C. 9276	10250	6634	Echo Emarthla.
C. 6875	10129	6513	Jimhoker Emarthla.

Roll No.	Deed No.	File No.	Name.
C. 6876	10128	6512	Hattie Emarthla.
C. 3619	5850	6358	Arch N. Evans.
C. 8804	15555	7976	Pan-te-nay Fulsom.
C. 5911	16092	8713	Hitchete Frank.
C. 7156	10040	6424	Lucy Frank.
C. 6341	10145	6529	Polly Franklin.
C. 7834	10181	6565	Eliza Foley.
C. 6119	10104	6488	Minnie Foley.
C. 6636	10137	6521	Martha Fox.
C. 4563	5818	6327	Lucy Field.
C. 8194	15549	7970	Yahola Fixeco.
C. 6941	15529	7950	Anderson Fixeco.
C. 8381	10162	6546	Choela Fixico.
C. 8334	10158	6542	Nocus Fixeco.
C. 4298	5825	6333	Cheyamy Fixico.
C. 4706	5807	6316	Pahose Fixeco.
C. 6816	15527	7948	Barney Fisher.
C. 6817	10123	6507	George Fisher.
C. 8814	15556	7977	Hannah Fish.
C. 4078	5837	6345	Willie Fish.
C. 4753	5806	6315	Billy Fish.
C. 4754	5805	6314	Eliza Fish.
C. 7716	10195	6579	Billy Factor.
C. 7707	10198	6582	Youthlechee Factor.
C. 4657	5812	6321	Jessie Fife.
C. 553	5758	6267	John Fields.
C. 8864	10222	6606	Ross Hulsa.
C. 7698	10199	6583	Thomas Hulptutta.
C. 8775	10017	6401	Sam Hoplye.
C. 9000	10032	6416	John Homer.
C. 8187	10269	6653	Chepe Homahta.
C. 8188	10268	6652	Mesela Homahta.
C. 8189	10267	6651	Folle Homahta.
C. 6447	15520	7941	Ida Hill.
C. 2662	15494	7916	Lucy Hill.
C. 4198	5833	6341	Noah Hinneha.
C. 7058	10087	6471	Amos Hickory.
C. 7447	10072	6456	Jesse Hill.
C. 7449	10071	6455	Lizzie Hill.
C. 7451	10070	6454	Sampson Hill.
C. 3448	5858	6336	Jennie Hill.
C. 5034	5789	6298	Hannah Hill.

Roll No.	Deed No.	File No.	Name.
C. 5784	15507	7928	Miley McWilliams.
C. 7490	10033	6450	Celia McPerryman.
C. 7124	10090	6474	Nannie McNac.
C. 6917	10049	6433	Peter McNac.
C. 503	5757	6263	Robert McNac.
C. 8518	10172	6556	James McHenry.
C. 2663	15495	7917	Walter McGilbray.
C. 8579	15551	7972	Aaron McGirt.
C. 5328	5773	6282	Alex McGirt.
C. 9516	15576	7997	Walter McDermott.
C. 8905	10219	6603	Thomas McCulla.
C. 8910	10218	6602	Nancy McCulla.
C. 7117	10093	6477	Eliza McCosar.
C. 7118	10092	6476	Ida McCosar.
C. 7119	10091	6475	Bettie McCosar.
C. 3010	5865	6373	Lemuel McCoy.
C. 8651	10112	6496	Sente Mulkussee.
C. 7531	10054	6438	Haga Monday.
C. 6740	10140	6524	David Monahwee.
C. 9247	10239	6623	Annie Moffitt.
C. 8670	10113	6497	Aggie Mitchell.
C. 7577	10205	6589	Johnson Miller.
C. 479	5756	6265	Robert Miller.
C. 7091	10088	6472	Okchiye Micco.
C. 5122	5783	6292	Lucy Yaholar.
C. 7547	10057	6441	Millie Yargee.
C. 8530	10173	6557	John Yargee.
C. 6922	10015	6399	Lila Yahola.
C. 8883	10221	6605	Dora Yahola.
C. 9072	15564	7985	Aney Yarholar.
C. 4841	5801	6310	Youbartka.
C. 8998	15560	7981	Yaffie.
C. 7603	10023	6407	James York.
C. 9273	10248	6332	Hardy Hennehuchee.
C. 8207	10177	6561	Chukchat Heneha.
C. 8093	10281	6665	Jeannetta Harjo.
C. 8096	10282	6666	Jennie Harjo.
C. 8901	10276	6560	George Harjo.
C. 7381	10078	6462	Nancy Lott.
C. 9143	15565	7986	Cora Lynch.
C. 8007	10272	6656	Lucy Long.
C. 8006	10271	6655	Kizzie Long.

Roll No.	Deed No.	File No.	Name.
C. 7139	10094	6478	Thomas Lakey.
C. 7976	15546	7967	Billie Micco.
C. 5508	15501	7922	Lizzie Lowe.
C. 7437	10073	6457	Levina Lowe.
C. 8890	10220	6604	Artiyarchee Micco.
C. 7983	15547	7968	Milker.
C. 3985	6601	6685	Rebecca Dyer.
C. 6983	10131	6515	Benjamin H. Drake.
C. 2174	5770	6279	Rachel F. Drew.
C. 7087	10084	6468	Alice Dorsey.
C. 9015	10230	6314	Jonas Dixon.
C. 8195	10263	6650	Jim Deer.
C. 9402	10234	6618	Eddie Deer.
C. 8216	10050	6434	Daniel Deer.
C. 3763	5851	6359	Lizzie Deer.
C. 3993	5843	6351	Thomas Deer.
C. 4045	5840	6348	Daniel Deer.
C. 8045	16095	8716	Ella Deer.
C. 7499	15533	7954	Katie Deere.
C. 6959	10108	6492	Peter Deere.
C. 3598	5854	6362	Tecumseh Deere.
C. 9271	10246	6330	Dewochee.
C. 8828	10226	6610	Ben Der isaw.
C. 7247	10101	6485	Susie Derrisaw.
C. 8206	10026	6410	Thompson Deo.
C. 9281	10252	6636	Joseph Davis.
C. 9246	10238	6622	Jesse Davis.
C. 8529	10059	6443	Jimmie Davis.
C. 3033	5868	6376	Martin Davis.
C. 4938	5793	6302	Annie Davis.
C. 4960	5792	6301	Esther Davis.
C. 5997	15511	7932	Selina Davis.
C. 5819	15509	7930	Martha Dawson.
C. 4673	5811	6320	Hittie Danly.
C. 9215	10235	6619	Thompson Daniel.
C. 1914	5772	6281	Jasper Daniels.
C. 8891	15559	7980	Takoser Tustenuggy.
C. 7095	10046	6430	Ned Tuckabatchee.
C. 3453	16087	8708	Topartheche.
C. 8920	10033	6417	Toot-ho-ye.
C. 5708	15506	7927	Lucy Toskey.
C. 8540	10174	6558	Lizzie Toney.

Roll No.	Deed No.	File No.	Name.
C. 9524	15577	7998	Edward B. Tiger.
C. 5188	15500	7921	Fannie Tiger.
C. 2631	15493	7915	Johnson Tiger.
C. 2892	15496	7918	Amanda Tiger.
C. 8619	10299	6683	Pa-sak-ta Tiger.
C. 9214	10286	6370	Sah co po chuny Tiger.
C. 9257	10241	6625	Goody Tiger.
C. 7712	10197	6581	Louis Tiger.
C. 8298	10156	6540	Wattie Tiger.
C. 6365	10134	6518	John Tiger.
C. 6336	10133	6517	Willie Tiger.
C. 6637	10132	6516	Jim Tiger.
C. 9209	10036	6420	Marsey Tiger.
C. 3938	6300	6384	David Tiger.
C. 3131	5863	6374	Tecumseh Tiger.
C. 3875	5847	6355	Pufney Tiger.
C. 5187	5781	6290	Leona Tiger.
C. 5317	5759	6268	Susan Tiger.
C. 8642	15552	7973	Otie Thompson.
C. 6735	15525	7946	Lucy Thompson.
C. 8443	5810	6319	Albert Thomas.
C. 7728	10193	6577	Cesar Thompson.
C. 8937	10217	6601	Little Thompson.
C. 7750	10185	6539	Te yo hee.
C. 8949	10215	6599	Tarhie Tebe.
C. 7586	10204	6588	Emma Taylor.
C. 6771	10141	6525	Jonas Taylor.
C. 7307	10079	6463	Jo-lo-lon-fah Taylor.
C. 7953	15541	7962	Mary Taylor.
C. 6015	15508	7929	Maria Taylor.
C. 5440	5804	6313	Thomas A. Stewart.
C. 7496	10035	6449	Martha Spaniard.
C. 7495	10034	6448	Chotie Spaniard.
C. 8805	10227	6611	Soc-con-tay.
C. 6449	10151	6535	Lahtah Solomon.
C. 6450	10150	6534	Celey Solomon.
C. 6653	10135	6519	Tecumseh Snow.
C. 6988	10130	6514	Sam Soloman.
C. 1256	5768	6277	Mary Snakeya.
C. 7895	15538	7959	George Smith.
C. 5825	15515	7936	Willie G. Smith.
C. 9283	10254	6638	Leo Smith.

Roll No.	Deed No.	File No.	Name.
C. 6317	10290	6374	Wesley Smith.
C. 8781	10277	6661	Wolke.
C. 8366	10161	6545	Francis Wolf.
C. 7411	10043	6427	Bettie Wolf.
C. 1476	5777	6286	Mary Wiley.
C. 6963	10287	6671	Seper Willior.
C. 8246	10116	6500	Wicey.
C. 9302	10259	6643	Ellen Williams.
C. 6644	10136	6520	Martha Williams.
C. 5252	5797	6306	Solomon Wilson.
C. 7715	10196	6580	George White.
C. 8099	10283	6657	Leah Wesley.
C. 6671	10155	6539	John Wesley.
C. 2300	5769	6278	Bettie May Wesley.
C. 4592	5814	6323	Feny West.
C. 9066	15563	7984	John Washington.
C. 7487	10068	6452	Marchie Washington.
C. 7488	10067	6451	Waitie Washington.
C. 5324	5760	6269	George Washington.
C. 5350	5786	6295	Robert L. Watts.
C. 4694	5808	6317	George W. Walker.
C. 9317	10260	6644	Kuncheva Harjo.
C. 9329	10261	6645	Jimmie Harjo.
C. 8958	10213	6597	Joe Tiger Harjo.
C. 7611	10203	6587	Nancy Harjo.
C. 7652	10202	6586	George Harjo.
C. 7227	10102	6486	Jennie Harjo.
C. 8313	10157	6541	Yarkinha Harjo.
C. 7083	10085	6469	Nellie Harjo.
C. 7082	10080	6464	Ka-pet cha Harjo.
C. 9298	10037	6421	Ispokoke Harjo.
C. 8574	10002	6386	Harjo.
C. 9539	15579	8000	Amos Harjo.
C. 9026	15562	7983	Nocus Harjo.
C. 6441	15519	7940	Peggy Harjo.
C. 6230	15517	7938	Betty Harjo.
C. 5589	15502	7923	Emarthla Harjo.
C. 6855	15528	7949	Wiley Hawkins.
C. 7281	10265	6649	Pink Hawkins.
C. 6860	10124	6508	Okla Hosta Hawkins.
C. 8706	10115	6499	Katie Hawkins.
C. 8433	10297	6681	Louis Hammer.

Roll No.	Deed No.	File No.	Name.
C. 2891	5871	6379	Hannah.
C. 7392	10077	6461	Artussee Henaha.
C. 8020	15578	7999	Sarah Harrod.
C. 8214	10175	6559	Melia (Nellie).
C. 8282	10208	6592	Hechiskoche.
C. 4156	5836	6344	Sam Marsey.
C. 4260	5841	6349	Marhoyee.
C. 5039	5787	6296	Samuel Marks.
F. 2168	17335	9215	Lilly Marshall.
C. 8803	15554	7975	Lizzie Marshall.
C. 4002	15498	7919	Hepsey Marshall.
C. 6844	10125	6509	Lizzie Manley.
C. 7869	15535	7956	Fannie Manley.
C. 9493	15573	7994	Wilson McKellop.
C. 9014	10229	6613	Nancy.
C. 8432	10167	6551	David Bruner.

The Commission does not say whether proof of death in each instance has been filed with them, but it is presumed by the office that such proof has been filed.

In view of the opinion of the Assistant Attorney General mentioned herein, it would seem that authority for the cancellation of such deeds and the records thereof and the issuance of new ones should be granted and the office so recommends.

Very respectfully,

A. C. TONNER,
Acting Commissioner.

G. A. W.—W. D. W.

(Copy.)

DEPARTMENT OF THE INTERIOR,
WASHINGTON, June 7, 1904.

E. A. F. •

I. T. D. 4516—1904.
L. R. S.

Commission to the Five Civilized Tribes, Muskogee, I. T.

GENTLEMEN: May 23, 1904, the Commission transmitted 484 deeds to the heirs of deceased citizens of the Creek Na

tion, which deeds have heretofore been approved by the Secretary of the Interior. You state that these deeds cover allotments of 160 acres each in one deed, and it is thought that under the opinion of the Assistant Attorney General for the Department, dated August 20, 1903, they should be cancelled and separate deeds covering the designation of a homestead of 40 acres and an allotment of 120 acres in lieu of the single deeds covering 160 acres each, be prepared and issued in their stead. You therefore request that authority be granted the Commission to cancel said deeds and the records thereof, and to prepare new deeds to the heirs of such citizens, whose names, roll numbers, and deed numbers appear in your said letter of May 23.

Reporting June 2 the Acting Commissioner of Indian Affairs recommends that your request be granted. A copy of his letter is inclosed herewith.

The deeds transmitted are returned herewith, and you are hereby authorized to cancel the record thereof and to request the Principal Chief of the Creek Nation to cancel the deeds. When the deeds are canceled you are requested to forward them, together with the new deeds made in accordance with your suggestion, to the Department for appropriate action.

Respectfully,

(Signed)

E. A. HITCHCOCK, *Secretary.*

485 Inclosures.

(Copy.)

Refer in reply to the following: Land 68471—1904.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, October 8, 1904.

The Honorable the Secretary of the Interior.

SIR: I have the honor to transmit herewith a communication from the Commission to the Five Civilized Tribes dated September 28, 1904, transmitting twenty-seven homestead and twenty-seven allotment deeds to citizens in the Creek Nation.

The Commission state that proof of death of each of these citizens has been filed with them, and they request authority to cancel these deeds and the records thereof, and to sub-

stitute in lieu new deeds covering the allotment to heirs in accordance with the opinion of the Assistant Attorney General of the Interior Department dated August 20, 1903.

The Fifty-four deeds are transmitted herewith, with the recommendation that the Commission be granted the authority as requested.

Very respectfully,

A. C. TONNER,
Acting Commissioner.

C. T. C.—A. A. G.

(Copy.)

F. H. E.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, October 12, 1904.

I. T. D. 10140—1904.

L. R. S.

Commission to the Five Civilized Tribes, Muskogee, Indian Territory.

GENTLEMEN: With your report of September 28, 1904, you transmitted 27 homestead and 27 allotment deeds to citizens in the Creek Nation, stating that proof of death of each of these citizens has been filed with your commission, and requesting authority to have cancelled the said deeds and the records thereof, and to substitute in lieu thereof new deeds covering the allotment to heirs in accordance with the opinion of the Assistant Attorney General of this Department dated August 20, 1903.

Reporting in the matter October 8, 1904, the Acting Commissioner of Indian Affairs concurs in your recommendation.

The Department also concurs, and authority is granted as requested. The deeds are returned herewith for cancellation in the usual manner, and a copy of the Acting Commissioner's letter is inclosed.

Respectfully,
(Signed)

THOS. RYAN,
Acting Secretary.

55 Inclosures.

(Copy.)

Land 71598—1905.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, September 18, 1905.

The Honorable the Secretary of the Interior.

SIR: I have the honor to transmit herewith a report from Commissioner Bixby, dated September 2, 1905, transmitting 7 homestead and 18 allotment deeds, to citizens of the Creek Nation. Proof of death of each of these citizens has been filed in the office of the Commissioner, showing that the allottees died prior to the date of execution of said deeds. The Commissioner requests Departmental authority to cancel these deeds, and the records thereof, and to substitute in lieu new deeds covering the allotments to the heirs, in accordance with the opinion of the Assistant Attorney General of the Indian Territory Department, dated August 20, 1903.

The Commissioner states that from the delivery stamped deeds to John Atkins, Tommie Davis, Sallie Kernall, and Anna Escoc, the same have been delivered, but that in each instance the office of the Commissioner is in possession of an affidavit of death, showing that the allottee died prior to the date of execution. Also proof of death has been filed in the case of special allotment deed to Leah Stevenson covering an area of 7.51 acres, showing that the allottee died prior to the execution of the deed. The 17 homestead and 18 allotment deeds are enclosed herewith, and it is respectfully recommended that the authority requested by the Commissioner be granted in order that new deeds may be issued to the heirs in proper form.

Respectfully,

C. F. LARRABEE,
Acting Commissioner.

C. T. C.
L. C.

I. T. D. 12212-1905.
L. R. S.

F. H. E.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, September 23, 1905.

Commissioner to the Five Civilized Tribes, Muskogee, Indian Territory.

SIR: The Department is in receipt of your letter of September 2, 1905, transmitting 17 homestead and 18 allotment deeds to citizens of the Creek Nation, and requesting authority for the cancellation of said deeds in the usual manner and the issuance of new deeds in lieu thereof to the heirs of the allottees, proof of death of each of the allottees having been filed in your office showing that the allottees died prior to the date of execution of said deeds.

Reporting September 18, 1905, the Indian Office recommends that the authority requested be granted. A copy of its letter is inclosed.

The Department also concurs, and authority is hereby granted for the cancellation of said deeds and the issuance of new and proper deeds to the heirs of the allottees.

The deeds are returned herewith.

Respectfully,

THOS. RYAN,
Acting Secretary.

Through the Commissioner of Indian Affairs.
36 inclosures.

(Copy.)

M.—411.

MUSKOGEE, INDIAN TERRITORY, January 6, 1906.

Honorable P. Porter, Principal Chief Creek Nation, Muskogee, Indian Territory.

DEAR SIR: If in your possession, will you please return to this office deeds Nos. 22276 and 22277 in favor of Mollie Lucas, Creek Indian Roll No. 7884, and deeds Nos. 19512 and 19513 in favor of Kogee Smith, Creek Indian Roll No.

6043, for the reason that there appears to be a conflict in the description of their allotments.

Respectfully,

Commissioner.

Department of the Interior.
Commissioner to the Five Civilized Tribes.
Muskogee Land Office.

Whereas, on August 23, 1902, the Commission to the Five Civilized Tribes, arbitrarily allotted to Mollie Lucas, Creek Indian Roll No. 7874, the North Half of the South Half of the North West Quarter of the North East Quarter of the South East Quarter and the North Half of the South West Quarter of the North East Quarter of the North East Quarter of the South East Quarter of Section 14, Township 8 North and Range 13 East, containing 3.75 acres, and,

Whereas, on March 17, 1903, the same land was allotted to Kogee Smith, Creek Indian Roll No. 6043, upon the personal application of her father, Joe Smith, and,

Whereas, deeds Nos. 19512 and 19513 prepared to cover an allotment to the said Kogee Smith were, on November 18, 1905, delivered to the said Joe Smith and have not been returned to this office, and,

Whereas, deeds Nos. 22276 and 22277 prepared to cover an allotment in the Creek Nation to the said Mollie Lucas were returned to this office on January 11, 1906, by the Principal Chief of the Creek Nation, same being undelivered,

It is, therefore, ordered, that the allotment made to Mollie Lucas on August 23, 1902, be cancelled, in so far as it conflicts with the allotment of the said Kogee Smith.

(Signed)

TAMS BIXBY,
Commissioner.

Muskogee, Indian Territory, January 23, 1906.

MUSKOGEE, INDIAN TERRITORY, January 25, 1906.

The Honorable the Secretary of the Interior.

SIR: On August 23, 1902, the Commission to the Five Civilized Tribes arbitrarily allotted to Mollie Lucas, whose name appears on Creek Indian Roll, opposite No. 7884, the North Half of the South Half of the North West Quarter

of the North East Quarter of the South East Quarter and the North Half of the South West Quarter of the North East Quarter of the North East Quarter of the South East Quarter of Section 14, Township 8 North, Range 13 East, containing 3.75 acres.

On March 17, 1903, through an error of this office, the same land was allotted to Kogee Smith, a minor, whose name appears on Creek Indian Roll, opposite No. 6043, upon the personal application of her father, Joe Smith.

Deeds Nos. 22276 and 22277 prepared to cover an allotment in the Creek Nation to Mollie Lucas were executed by the Principal Chief of the Creek Nation on November 10, 1903, approved by the Department January 8, 1904, and recorded in the office of the Commission to the Five Civilized Tribes in Book 20, at page 173. These deeds were, on January 11, 1906, returned by the Principal Chief, same having been undelivered.

Deeds Nos. 19512 and 19513 prepared to cover an allotment to Kogee Smith were, on November 18, 1905, delivered by the Principal Chief to the said Joe Smith.

It appears, therefore, that, notwithstanding the date of the allotment to Kogee Smith is subsequent to that of Mollie Lucas, yet, Kogee Smith is the one to whom title has passed, inasmuch as the delivery of her deeds has been affected.

As the allotment of Mollie Lucas was purely an arbitrary designation on the part of the Commission and the allotment of Kogee Smith was personally selected by her father, I respectfully request that this office be authorized to cancel the deeds covering the allotment of Mollie Lucas and the records pertaining thereto.

Deeds Nos. 22276 and 22277 are herewith inclosed for Departmental disposition.

Respectfully,

Acting Commissioner.

Through the Commissioner of Indian Affairs.
Enc. N. E. W. 2.

(Copy.)

Refer in reply to the following: Land. 9128-1906.

DEPARTMENT OF THE INTERIOR, OFFICE OF INDIAN AFFAIRS,
WASHINGTON.

March 7, 1906.

The Honorable the Secretary of the Interior.

SIR: There is enclosed a report from the Commissioner to the Five Civilized Tribes, dated January 25, 1906, saying that on August 23, 1902, the Commission arbitrarily allotted to Mollie Lucas, whose name appears on the Creek roll of citizens by blood, at No. 7884, the N/2 of the S/2 of the NW/4 of the NE/4 of the SE/4, and the N/2 of the SW/4 of the NE/4 of the NE/4 of the SE/4, section 14, township 8 north, range 13 east, 3.75 acres; that on March 17, 1903, through error, the same land was allotted to Kogee Smith, a minor, who is enrolled at No. 6043 of the roll of citizens by blood of the Creek Nation; that deeds numbered 22276 and 22277 were prepared to cover the allotment to Mollie Lucas and were executed by the Principal Chief on November 10, 1903, approved by the Department on January 8, 1904, and recorded by the Commission to the Five Civilized Tribes in Book 20, page 173.

He says that on January 11, 1903, these deeds were returned by the Principal Chief, with the information that they had not been delivered; that deeds numbered 19512 and 19513, covering the allotment of Kogee Smith, were delivered on November 18, 1905, to Joe Smith, his father; and that it appears that, notwithstanding the date of the allotment of Kogee Smith is subsequent to that of Mollie Lucas, title has passed to Kogee Smith, inasmuch as his deeds have been delivered.

Mr. Bixby recommends the cancellation of the deeds in favor of Mollie Lucas and asks that he be authorized to cancel the records pertaining thereto.

It is shown that the allotment to Mollie Lucas was made arbitrarily by the Commission; that the deeds have not been delivered; and that the same land was allotted to Kogee Smith, and the Office concurs in the recommendation of the Commissioner to the Five Civilized Tribes that the deeds be

canceled, as they have not been delivered, and that he be authorized to cancel the records relating to them.

Very respectfully,

C. F. LARRABEE,
Acting Commissioner.

G. A. W.—G. H.
4 enclosures.

(Copy.)

DEPARTMENT OF THE INTERIOR, WASHINGTON.

I. T. D. 4026-1906.
L. R. S.

F. H. E.

March 13, 1906.

The Commissioner to the Five Civilized Tribes, Muskogee,
Indian Territory.

SIR: February 25, 1906, your office requested authority to cancel Creek deeds Nos. 22276 and 22277, covering land arbitrarily allotted to Mollie Lucas, and which were returned undelivered by the Principal Chief on January 11, 1906, in appearing that deeds Nos. 19512 and 19513, covering the same land, were subsequently issued to Kogee Smith, and delivered.

Reporting March 7, 1906 (Land 9128-06), the Indian Office recommends that the authority requested be granted. A copy of its letter is inclosed.

Said deeds Nos. 22276 and 22277 are returned herewith, and authority is granted for their cancellation in the usual manner.

Respectfully,
(Signed)

THOS. RYAN,
First Assistant Secretary.

3 inclosures.

Through the Commissioner of Indian Affairs.

M-411.

MUSKOGEE, INDIAN TERRITORY, April 24, 1906.

Principal Chief of the Creek Nation, Muskogee, Indian Territory.

DEAR SIR: Under date of March 20, 1906 (I. T. D. 4026), the Department granted authority for the cancellation of deeds numbered 22276 and 22277, prepared to cover an allotment in the Creek Nation to Mollie Lucas, Creek Indian Roll number 7884, for the reason that a portion of the land described therein had on a prior date been deeded to another allottee of the Creek Nation. Authority was also granted for the execution of new deeds in lieu thereof showing the correct description of the allotment of the said Mollie Lucas.

All deeds are inclosed herewith for appropriate action by you after which kindly return to this office in order that they may be transmitted to the Department for consideration.

Respectfully,

Commissioner.

J. B. M.

Inc. M-19.

(Copy.)

DEPARTMENT OF THE INTERIOR, J. R. W.
Office of the Assistant Attorney-General. S. V. P.

I. T. D. W. C. P.
4350-1906.

WASHINGTON, May 4, 1906.

The Secretary of the Interior.

SIR: I received by reference of April 7, 1906, the papers in the matter of single deeds issued to deceased Creek allottees for decedents' entire allotment, without selection or designation of a homestead or separate conveyance of it. About forty-nine such single deeds have been issued, but the dates of death and ages of decedents are such as to exclude the fact that more than eleven could have left issue born after May 25, 1901.

The laws for allotment to Creek Indians provide for issue of two separate deeds—one for forty acres as his homestead, conveying a particular estate, limited, and descending to

particular heirs, and one for one hundred and twenty acres, descending to heirs generally (acts of March 1, 1901, 31 Stat., 86, and June 30, 1902, 32 Stat., 500).

The Commissioner to the Five Civilized Tribes, February 12, 1906, discussing the cases generally, expressed opinion to the effect that:

1. The selection of a homestead and separate conveyance of it and of the general allotment are "conditions precedent, necessary to be performed before good title can be conveyed to the Creek allottee or his heirs in every case in which the rights of the fifth class (children born after May 25, 1901,) may by any possibility be affected," and that the selection of the homestead prior to any conveyance is essential to validity of the deed, in any case "where the original allottee or children born to him subsequent to May 25, 1901, are in being," but that "where a Creek allottee dies leaving no children born subsequent to May 25, 1901, a single deed * * * otherwise regular, constitutes a substantial compliance with the provisions of the Creek agreements * * * and will convey * * * good title to the whole of such deceased citizen's allotment."

The Commissioner specifies the eleven decedents who may have left children born to them after May 25, 1901, and as to the forty-nine instances of conveyance of the entire allotment of a decedent by one deed reports that he is reliably informed that in some cases the lands have been disposed of by the decedent's heirs to purchasers, and the titles have become complicated and clouded. He therefore recommends that in the thirty-eight cases wherein there could have been no issue born to the allottee after May 25, 1901, the single deed be allowed to stand; and as to the eleven cases that an investigation be had to ascertain the fact, and if no issue born after May 25, 1901, exists, such deeds be allowed to stand, and where such issue is found proper action be taken.

The Indian Office was of opinion that the law is mandatory, that two deeds must issue, and refers to the case of Bessie Watson, who died March 25, 1901, aged ten years, to whom, it is for illustration assumed, a deed issued the day after her death, which for such fact is void. The Indian Office is of opinion that the fact that some person may claim to have acquired title to the land after delivery of such deed is no reason wherefore such deed should not be canceled and a proper one issue, and reference is made to my opinion of

August 20, 1903, in allotment of John S. Meagher, deceased, concluding the matter.

I am unable to concur in the view expressed by the Commissioner of the Five Civilized Tribes—that such deeds improperly issued convey title and will be sustained by the courts in cases that decedent had no issue born after May 5, 1901. I am unable to see any principle on which such title can be founded. The deed having been made in violation of the law governing the officers who execute it is void from its inception for want of power of the officer to convey. It is like a patent for public land issued without authority of law or in violation of law. Such patents are void, and need no cancelation. The court so held in *Burfenning v. Chicago, St. Paul, &c., Ry.*, 163 U. S., 321, 323. They are simply inoperative and stand as blank paper. There need be no reconveyance of the title attempted to be conveyed, for the simple reason that no title was conveyed. The inadvertent issue of such deed is therefore no obstacle to the issue of proper ones. If equitable rights in such cases have been vested by conveyances of the proper persons, the title when passed will inure to the holder of the equitable interest. If no equitable right has vested, the one entitled to succession ought to be vested with a complete title. It is to the true interest of all claimants that legal title be issued. Then, all vested rights, legal and equitable, will be conserved.

Very respectfully,

FRANK L. CAMPBELL,
Assistant Attorney-General.

Approved May 4, 1906.

E. A. HITCHCOCK,
Secretary.

J. P.

Department of the Interior, F. H. E.

I. T. D. 7470-1906.

WASHINGTON, May 9, 1906.

L. R. S.

The Commissioner to the Five Civilized Tribes, Muskogee, Indian Territory.

SIR: Referring to your letter of February 12, 1903, relative to a single Creek deed issued in the name of Katie Miller,

and certain other similar deeds, there is inclosed a copy of the opinion of the Assistant Attorney General of May 4, 1906, which has been approved, relative to such "single deeds." You will be governed thereby.

The Miller deed having been found in the Indian Office, is inclosed, together with a copy of the Indian Office letter of March 13, 1906 (Land 17396), submitting your communication.

Respectfully,

JESSE E. WILSON,
Assistant Secretary.

3 inclosures.

Through the Commissioner of Indian Affairs.

[Endorsed:] (Filed.) No. 18460. Commissioners to Five Tribes. Received May 16, 1906. 41,110. Department, Wilson, Washington, D. C., May 9, 1906. Transmits copy of opinion of Assistant Attorney General of May 4, 1906, relative to "single deeds" and directs that Commission be governed accordingly in matter of case of Katie Miller.

MUSKOGEE, INDIAN TERRITORY, May 5, 1906.

The Honorable the Secretary of the Interior.

SIR: Under date of March 13, 1906 (I. T. D. 4026), the Department granted authority for the cancellation of deeds numbered 22276 and 22277 prepared to cover an allotment in the Creek Nation to Mollie Lucas, whose name appears upon Creek Indian roll opposite number 7884, for the reason that a portion of the land therein described had been allotted to another citizen of the Creek Nation and deeds issued therefor. In accordance with such authority the Principal Chief of the Creek Nation on April 25, 1906, cancelled his signature to said deeds and executed in lieu thereof new deeds bearing the same numbers and covering a correct description of the allotment of the said Mollie Lucas.

I now have the honor to inclose all deeds herewith and respectfully recommend that the cancellation of the old deeds and the execution of new deeds in lieu thereof be approved.

Respectfully,

Acting Commissioner.

J. B. M.

Inc. M-3.

Through the Commissioner of Indian Affairs.

Department of the Interior.

Office of Superintendent for the Five Civilized Tribes,
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing are true and correct copies of letter press copies of telegrams and letters, and other documents on file in this office, as follows:

Telegram dated October 13, 1897.	Book A, page	165
Amendment of September 27, 1897, reasons why it was rejected by Creek Council, approved November 3, 1897.		
Letter dated July 11, 1898.....	Book B, page	273
Letter dated Aug. 6, 1898.....	" B, "	432
Letter dated January 23, 1901...	" 36, "	17
Letter dated March 25, 1902.....	" 4, "	95
Telegram dated April 8, 1902...	" 4, "	168
Letter dated December 4, 1897...	" A, "	277
Letter dated June 15, 1899.....	" K, "	315
Letter dated May 16, 1904.....	" 19, "	360
Letter dated January 31, 1907...	" 826, "	367
Letter dated Oct. 6th, 1897.....	" A, "	45
Telegram dated November 1, 1897	" A, "	163
Letter dated November 4, 1897...	" A, "	156
Letter dated October 25th, 1898, from Secretary of the Interior to Hon. Henry L. Dawes.		
Letter dated November 9, 1898..	Book D, page	263
Letter dated February 14, 1899..	" G, "	10
Letter dated July 28th, 1899....	" M, "	63
Letter dated August 15, 1899...	" M, "	395
Letter dated August 28, 1899...	" N, "	102
Letter dated September 11, 1899..	" N, "	362
Letter dated September 11, 1899..	" N, "	361
Letter dated September 15, 1899..	" N, "	433
Letter dated September 19, 1899..	" N, "	425

Letter dated November 22, 1899..	"	R,	"	9
Letter dated December 4, 1899...	"	R,	"	43
Letter dated December 4, 1899...	"	R,	"	41
Letter dated December 23, 1899...	"	U,	"	5
Letter dated December 23, 1899...	"	U,	"	9
Letter dated December 27, 1899.	"	U,	"	19
Letter dated January 4, 1900....	"	V,	"	10
Special Dispatch to <i>The Times</i> ..	"	7,	"	26
Letter dated April 21, 1900....	"	8,	"	19
Letter dated January 17, 1901...	"	35,	"	5
Letter dated March 2, 1901.....	"	41,	"	10
Letter dated March 6, 1901.....	"	42,	"	5
Letter dated March 6, 1901.....	"	42,	"	5
Letter dated March 6, 1901.....	"	42,	"	6
Letter dated March 6, 1901.....	"	42,	"	5
Letter dated March 11, 1901.....	"	43,	"	21
Letter dated March 14, 1901....	"	43,	"	23
Letter dated Apr. 5th, 1901, signed N. G. Gregory, to Hon. Dawes Commission.				
Letter dated April 11, 1901.....	Book 46,	page		42
Letter dated April 12, 1901.....	" 46,	"		45
Circular letter of P. Porter, Prin- cipal Chief, dated April 30, 1901.				
Order of John R. Thomas, Judge of U. S. Court, Northern Dis- trict of Indian Territory, dated May 1, 1901.				
Letter dated May 20, 1901.....	Book 52,	page		25
Letter dated May 21st, 1901.....	" 52,	"		356-
Letter dated May 22, 1901.....	" 52,	"		375-
Letter dated May 22, 1901.....	" 52,	"		364-
Letter dated May 22, 1901.....	" 52,	"		380-8
Letter dated June 21, 1901.....	" 56,	"		35
Letter dated July 13, 1901.....	" 59,	"		32
Letter dated July 13, 1901.....	" 59,	"		35
Letter dated November 12, 1901..	" 1,	"		42
Letter dated November 24, 1906..	" 787,	"	256 &	27
Telegram dated March 2, 1901...	" 41,	"		29
Letter dated June 12, 1901.....	" 55,	"		31
Letter dated December 8, 1902..	" 10,	"		31

- Resolution by the National Council of the Muskogee Nation approved May 15, 1895.
- Act of National Council of Creek Nation approved May 30, 1895.
- Act of National Council of Creek Nation approved November 6, 1896.
- Letter dated January 30, 1901... Book 1, page 12-13-14
- Letter of P. Porter to House of Kings and Warriors dated November 27, 1901.
- Letter from A. P. McKellop and H. C. Reed, dated November 27, 1901, to Hon. P. Porter.
- Resolution of the National Council of the Muskogee Nation approved December 2, 1901.
- Telegram dated July 11, 1902... Book 7, page 196
- Letter dated June 25, 1903..... " 14, " 17
- Excerpt from First Annual Message of P. Porter, Principal Chief, October 4, 1904.
- Letter dated September 13, 1906. " 37, " 48
- Telegram (no date) to Secretary of Interior " 15, " 45
- Act of Creek Council *in re* fraudulent enrollments, approved November 2, 1906.
- Departmental letter of August 25, 1903, and opinion of F. L. Campbell, Assistant Attorney-General, dated August 20, 1903, regarding issuance of homestead and allotment deeds to deceased Creek citizens.
- Departmental letter of June 2, 1904, regarding issuance of deeds to deceased Creek allottees.
- Departmental letter of June 7, 1904, regarding issuance of deeds to deceased Creek allottees.

- Indian Office letter of October 8, 1904, to Secretary of Interior *in re* cancellation of Creek deeds.
- Departmental letter of October 12, 1904, granting authority for cancellation of Creek deeds.
- Indian Office letter of September 18, 1905, to Secretary of Interior recommending cancellation of Creek deeds.
- Departmental letter dated September 23, 1905, *in re* cancellation of Creek deeds.
- Letter dated January 6, 1906. . . . Book M, page 411
- Order of Commissioner to Five Civilized Tribes cancelling allotment of Mollie Lucas.
- Letter dated January 25, 1906. . . Book 31, page 184
- Indian Office letter to the Secretary of the Interior dated March 7, 1906, recommending cancellation of deeds to Mollie Lucas.
- Departmental letter dated March 13, 1906, authorizing cancellation of deeds to Mollie Lucas.
- Letter dated April 24, 1906. . . . Book M, page 411
- Indian Office letter of May 4, 1906, to Secretary of Interior regarding issuance of deeds to deceased Creek allottees.
- Departmental letter of May 9, 1906, regarding issuance of deeds to deceased Creek allottees.
- Letter dated May 5, 1906. Book 33, page 150

JOE H. STRAIN,

*Acting Superintendent for the
Five Civilized Tribes.*

April 3, 1917.
J. R. P.

Excerpt from "Report of the Commission Appointed to Negotiate with the Five Civilized Tribes of Indians. Known as The Dawes Commission," Dated at Fort Smith, Arkansas, November 18, 1895.

MISRULE IN THE TERRITORY.

A greater familiarity with the condition of affairs in the Territory than the Commission had at the time of making their last report does not enable it to abate anything of its representation of the deplorable state of affairs as therein stated. They are not only compelled to reaffirm all that they reported of the utter perversion of justice by those who have gotten possession of the machinery and funds of its administration in this Territory, inflicting in its name and that of the lawmaking power irreparable wrongs and outrages upon a helpless people for their own gain, but they are compelled to report that statistics and incontrovertible evidence shows a much more deplorable and intolerable state of affairs than was there presented. They refer to that report for a more extended detail of the character of the misrule which exists among these people, and make that more particular description than is here necessary a part of this report. If the end of government and the administration of justice is the protection of the life and liberty and property of the citizen, then the governments and courts of these nations are a failure, for they afford that protection to neither. They are powerless to these ends, and the victims of this misrule are helpless sufferers at the mercy of the malign influences which dominate every department and branch of the governments as administered here. It matters little, except as to the character of the remedy, whether this failure and misrule arises from the impotence or willful and corrupt purpose, the evil consequences are incalculable and its continuance unjustifiable. It is no less true now than when the Commission reported last year that "all of the functions of the so-called governments of these five tribes have become utterly unable to protect the life or property rights of the citizen. Their courts of justice have become powerless and paralyzed. Violence, robbery, and murder have become almost of daily occurrence, and no effective measures of restraint or punishment are put forth by these governments and courts to suppress crime.

Railroad trains continue to be stopped and their passengers robbed in the very presence of those in authority. A reign of terror exists, and barbarous outrages almost impossible of belief are enacted, and the perpetrators hardly find it necessary to shun daily intercourse with their victims."

The United States district court at Fort Smith, Ark., has been given jurisdiction in the Indian Territory only over crimes committed by an Indian upon a white man or by a white man upon an Indian. Of all crimes committed by Indians upon Indians the Indian courts still have sole jurisdiction. In this limited jurisdiction of the United States court the present able and upright judge has, since his appointment in 1875, sentenced to death on conviction in his court 153 persons, and there are today in the United States jail at Fort Smith under sentence of death appealed on questions of law 20. Of these 20 have been convicted the present year, the largest number in any one year. There are now under indictment for murder and awaiting trial 13 others and several are in jail awaiting examination. There is also the United States court at Paris, Tex., having similar jurisdiction in the Indian Territory, the records of which show that since 1890 there have been 22 sentenced to death for murders committed in the Territory, and there are now under indictment 128, nearly all of whom are eluding arrest. How many murders in addition to these have been committed by Indians upon Indians, of which their courts have exclusive jurisdiction, there is no record available, but there is good reason to believe that they exceed these numbers. Reliable newspapers and individuals who have endeavored to obtain accurate information as to the prevalence of crime in the Territory agree in the statement that up to November 1 there had been 25 murders committed in the Territory since the last adjournment of Congress. Of course there have been many others not thus ascertained. If other crimes have in any degree proportion to that of murder in the Territory the condition must be appalling and cannot fail to call loudly for a remedy.

In addition to these statistics of prevalent crime taken from judicial records and other authentic sources there is equal clear evidence of organized force in active operation intimidating and putting in peril witnesses who appear in court to testify for the government in these cases. In cases of the most serious character now pending in these courts the witnesses have been, one by one, secretly assassinated. In other

they have disappeared, and whether slain or not is not likely to be known until, by the failure of justice thus brought about, those charged with the most atrocious crimes have gone free. This terrorism makes it most difficult to obtain in the first instance witnesses to appear in court, knowing that by doing so they expose themselves to all possible persecution and personal danger, even to loss of life. In spite of the best efforts of the United States courts there is for this reason a most lamentable frequent failure of bringing to justice those guilty of the most flagrant crimes in the Indian Territory.

The terrorism and intimidation is extended even to those who appear before this Commission with information as to the condition of affairs in the Territory and offer their views as to necessary changes. Not infrequently have highly respected citizens of these nations requested the Commission to withhold their names from any connection with the statements made by them as a necessary precaution to personal safety. And in the discussion among themselves of the questions involved they for the same reason take care that it shall be only in the presence of those whom they can trust not to betray them to others who are hostile to the objects of this Commission.

Recently the mayor of one of the towns which have sprung up in the Territory, a man of known integrity and irreproachable character, appeared before the Commission and presented his knowledge of the condition of affairs and his views of the necessity of a change. In a few days the Commission were in receipt of a letter from him informing them that he had been followed in Missouri, where he went on business, by two armed Indians, who informed him that he would be killed if he returned home through the Territory. He called upon the Commission for protection, which it had no power to give. This is not a singular instance, but the like of it is so frequent as to disclose a condition of affairs as deplorable as it is intolerable.

CONCLUSIONS.

The Commission was charged with the duty of negotiation only. They have been clothed with no authority beyond presenting to these "nations" such reasons as might induce them to consent to a change of their tribal holdings and gov-

ernments upon terms that shall be just and equitable to all concerned, to be made binding only after ratification by the tribes themselves and the United States. Keeping strictly within their instructions, they have presented to these nations every argument and consideration open to them calculated to make clear the necessity, the justice, and the benefit of such a change in the tenure of their tribal property and in their tribal governments as will conform all to our national system and prepare them to become a part of it. The Commission has found, however, that those having authority to consider these proposed changes are the very persons whose interest it is to prevent them, and that the longer the present conditions continue the greater will be their gain. Every selfish instinct of those holding the power to consider propositions for a change is therefore arrayed against its exercise. They have declined directly, or ignored altogether, all formal propositions for negotiation made to them, and in informal conferences have made it clear that no considerations of the Commission has authority to present will induce them to voluntarily relinquish their present opportunities for vast gain and consent to share equally with all the Indian citizens the tribal property the United States originally placed in the custody of these "nations" for the common use of all, or to exchange the power they now possess to perpetuate their exclusive use of common property and dictate the character and terms of government under which these people live for anything analogous to the institutions of our own Government by which they are surrounded. The very men who, in the manner heretofore described, have got in their personal grasp the vast tribal wealth of these "nations," elect and control the legislators in their councils, and denominate the work of this Commission as the "interference of a foreign power not to be tolerated, and seek to punish with the penalties of treason any citizen Indian found advocating a change that shall require equal rights and equal participation.

The Commission is compelled to report that so long a power in these nations remains in the hands of those now exercising it, further effort to induce them by negotiation to voluntarily agree upon a change that will restore to the people the benefit of the tribal property and that security and order in government enjoyed by the people of the United States will be vain.

The Commission is therefore brought to the consideration

of the question: What is the duty of the United States Government toward the people, Indian citizens and United States citizens, residing in this Territory under governments which it has itself erected within its own borders?

No one conversant with the situation can doubt that it is impossible of continuance. It is of a nature that inevitably grows worse, and has in itself no power of regeneration. Its own history bears testimony to this truth. The condition is every day becoming more acute and serious. It has as little power as disposition for self reform.

Nothing has been made more clear to the Commission than that change, if it comes at all, must be wrought out by the authority of the United States. This people have been wisely given every opportunity and tendered every possible assistance to make this change for themselves, but they have persistently refused and insist upon being left to continue present conditions.

There is no alternative left to the United States but to assume the responsibility for future conditions in this Territory. It has created the forms of government which have brought about these results, and the continuance rests on its authority. Knowledge of how the power granted to govern themselves has been perverted takes away from the United States all justification for further delay, insecurity of life and person and property increasing every day makes immediate action imperative.

The pretense that the Government is debarred by treaty obligation from interference in the present condition of affairs in this Territory is without foundation. The present conditions are not "treaty conditions." There is not only no treaty obligation on the part of the United States to maintain, or even to permit, the present condition of affairs in the Indian Territory, but on the contrary the whole structure and tenor of the treaties forbid it. If our Government is obligated to maintain the treaties according to their original intent and purpose, it is obligated to blot out at once present conditions. It has been most clearly shown that a restoration of the treaty status is not only an impossibility, but if a possibility, would be disastrous to this people and against the wishes of all, people and governments alike. The cry, therefore, of those who have brought about this condition of affairs, to be let alone, not only finds no shelter in treaty ob-

ligations but is a plea for permission to further violate those provisions.

The Commission is compelled by the evidence forced upon them during their examination into the administration of the so-called governments in this Territory to report that these governments in all their branches are wholly corrupt, irresponsible and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect.

There can be no higher obligation incumbent upon every branch of the General Government than to exert its utmost constitutional authority to secure to this people, in common with all others within our borders, government in conformity with constitutional authorities. The Government cannot abdicate or transfer to other shoulders this duty as to any portion of territory or people in the land. It cannot escape responsibility if the dark record which has now been brought to light is permitted to continue. Delay can bring nothing but increased difficulty and danger to peace and good order in the Territory. The situation calls for prompt action. These considerations lead but to one conclusion.

It is, in the judgment of the Commission, the imperative duty of Congress to assume at once political control of the Indian Territory. They have come with great reluctance to this conclusion, and have sought by all methods that might reach the convictions of those holding power in the Territory to induce them by negotiation and mutual agreement to consent to a satisfactory change in their system of government and appropriation of tribal property. These efforts have failed, and the Commission is driven to the alternative of recommending abandonment of these people to the spoliation and outrages perpetrated in the name of existing governments or the resumption by Congress of the power thus abused.

They therefore recommend immediate legislation as follows:

1. A Territorial government over the Five Civilized Tribes, adapted to their peculiarly anomalous conditions, so framed as to secure all rights of residents in the same, and without impairing the vested rights of the citizen Indian or other person not an intruder.

2. The extension of the jurisdiction of the United States

courts in the Territory, both in law and equity, to hear and determine all controversies and suits of any nature concerning any right in or use and occupation of the tribal lands of the several nations, to which any citizen Indian or other person, or the tribal government of any nation, is or may be made a party plaintiff or defendant.

The Commission is confident that such a government wisely administered will restore the observance of law and preserve order among the people residing in these several nations, and make secure their lives and all just property rights. And that the determination in the United States courts of the most important and complicated questions in which the tenure of their land is unfortunately involved, lifting them out of the unhealthy and unreliable influences which prevail in the Indian courts, where now alone they are disposed of, would go far toward a solution of the difficult problem the present condition of the Territory presents.

Respectfully submitted,

HENRY L. DAWES.

FRANK C. ARMSTRONG.

ARCHIBALD S. McKENNON.

THOMAS B. CABANISS.

ALEXANDER B. MONTGOMERY.

Excerpt from "Five Civilized Tribes Commission's Report"
Dated at Fort Smith, Ark., November 28, 1896.

* * * * *

The Commission also made public, in like manner after careful consideration, the following notice of mode of procedure, best calculated to secure a just consideration of all claims over which Congress had given them jurisdiction:

VINITA, IND. T., July 8, 1896.

To Whom It May Concern:

The Congress of the United States at its recent session, enacted that the Commission to the Five Civilized Tribes:

(Here the Commission quotes from the provisions of the act of Congress of June 10, 1896 (29 Stat., 339).

Any person desiring that said Commission shall pass upon his claim for citizenship, in any of said tribes, under the

provisions of this act, must make application in writing, signed and sworn to, containing a particular statement of the grounds upon which his claim is based, and accompanied by such evidence, in the form of affidavits, depositions, or record evidence, as he may desire to have considered in support of his claim, all to be forwarded under seal to the Commission, at Vinita, Ind. T., before the 10th day of September, 1896.

The application should state facts sufficient, if true, to show that the applicant is entitled to citizenship. The applicant must, at the same time, furnish the chief or governor of the nation in which citizenship is sought a copy of such application and evidence, and shall furnish to the Commission evidence of that fact. Such chief or governor must, within thirty days thereafter, furnish the Commission with answer thereto, signed and sworn to by some duly authorized officer of his government, and accompanied by such evidence in the form of affidavits, depositions, or record evidence as he may desire the Commission to consider in support of his answer.

All arguments shall be in writing.

HENRY L. DAWES, *Chairman*:
FRANK C. ARMSTRONG,
A. S. McKENNON,
T. B. CABANISS,
A. B. MONTGOMERY,
Commissioners.

The following are excerpts from annual report of the Dawes Commission for the year 1898.

Page 3.

WASHINGTON, D. C., October 3, 1898.

SIR: The Commission to the Five Civilized Tribes submits the following report of the progress of the work under their charge since the report made October 11, 1897. At that time the Commission had just completed the work required of them by statute of June 10, 1896, "to hear and determine the application of all persons who may apply to them for citizenship in any of the said nations, and after said hearing they shall determine the right of such applicant to be so admitted and enrolled. There had been presented to

them some 7,500 different applications under this law, each application, in many cases, embracing others alleged to be of the same family and claiming under the same title, amounting in all to nearly if not quite 75,000 individuals, cases requiring a separate application of the evidence upon which they rested.

Of these applications there were admitted by the commission as follows, viz:

In the Choctaw Nation.....	1,212
In the Chickasaw Nation.....	334
In the Cherokee Nation.....	274
In the Creek Nation.....	255
Total	<hr/> 2,075

The large number of failures to obtain admission to citizenship by the Commission thus shown is attributed in a great measure to the fact that the Commission was required by the statute "in determining such applications to respect all laws of the several nations or tribes not inconsistent with the laws of the United States and all treaties with said nations or tribes, and give full force and effect to the rolls, usages and customs of said nations and tribes." This was right and proper for the reason that for half a century or more the tribal government had been permitted to control the matter of citizenship and had, therefore, legislated upon it and to disregard their laws, usages, and customs at this late hour would be revolutionary and impracticable. The erroneous idea had, however, become prevalent that blood alone constituted a valid claim to citizenship in the several nations, regardless of other qualifications required by treaties and the constitution, laws, and usages of the several nations by which the Commission was to be * * * (page 4). There had grown up, however, grave suspicions as to the integrity of these rolls. Many scandals respecting their manipulation under tribal authority had become very general to be believed by the conservative citizenship of the several nations. The commission had, therefore (in their report of November 18, 1895), felt compelled to call attention to the condition of these rolls. It is not necessary to repeat here the statements then made, which are not believed to have been exaggerated. The work of the commission in adding new names to citizenship had proven so satisfactory

to that class of citizens before named that a desire became general among them that the commission be clothed with authority to also review and reform the existing rolls. This resulted subsequently to that power being conferred on them by Congress. Their workings under this provision will be reported in another connection.

* * * * *

Page 5.

In the meanwhile, in contemplation of the condition in which the Territory would be left by possible failure to ratify pending agreements, Mr. Curtis, of the Indian committee of the House, addressed himself to the preparation of a bill, the general design of which would be to transfer the control of the property rights in these nations from tribal authority to that of the United States, much the same as their political government had been transferred by the act which was to take effect January 1, 1898. The result of this undertaking of Mr. Curtis, on which he bestowed much time and exhaustive labor, availing himself of all the assistance of others which he could command, has been the act entitled "An act for the protection of the people of the Indian Territory, and for other purposes," known as the "Curtis bill." The knowledge of the preparation of this bill aroused great opposition of those in the Territory opposed to any change in the exclusive use of tribal property by the few controlling the government of the Territory. Accordingly large delegations were sent to Washington, at great expense to their national treasuries, for the purpose of preventing such legislation and procuring, if possible, the repeal of the law taking away so much of their political power, which was to take effect January 1, 1898. It was deemed necessary, therefore, to require the presence of the commission in Washington during the pendency of such legislation to give information to the committees having it in charge as to the real condition of the Territory and the needs and character of the legislation proposed. At the request of these committees, and with the approval of the Department, the commission remained in Washington until the final action upon this bill, rendering such assistance as was in its power to the several committees, based upon accurate and reliable information in relation to the many questions involved in the comprehensive scope of the proposed measure,

well as upon their experience and observation while in Territory. After many changes and modifications, it is believed to have taken the best final shape possible under the circumstances.

* * * * *

Page 7.

In the prosecution of this larger work of taking the census and perfecting the citizenship roll the commission has found it necessary, in order to insure accuracy and dispatch as well as to relieve as much as possible claimants of unnecessary expense, to go themselves in the country and meet those claiming such enrollment in person, and to determine from their own story under oath and such other evidence deemed necessary the justice of each claim, thereby relieving the applicant as much as possible from the expense and delay attendant upon the employment of counsel to present their claims at particular points and on stated days for hearings. This has made it necessary for the commission to procure outfits and camp equipage required in passing from place to place and in maintaining themselves and clerks in the open country much of the time while conducting the work. The result has fully justified this method. In addition, it has enabled the applicants, more clearly than any other method would, to understand the purpose of the Government in these proceedings, thereby creating a better feeling in this class of Indian citizens toward the Government and its officials. Hitherto they have been kept as far as possible in ignorance of the purposes of the Government in seeking the changes proposed by this commission. It has been for the interest of many influential persons among them, to keep them in the belief that the United States in these negotiations is seeking to wrest from them their heritage. This method of working among them is doing much to dispel this delusion and open their eyes to the real purpose.

* * * * *

Respectfully submitted for the Commission to the Five Civilized Tribes by

HENRY L. DAWES,
Chairman.

The Honorable Secretary of the Interior."

*Excerpts from the Annual Report of the Dawes Commission
for the Fiscal Year Ending June 30, 1899.*

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Page 10.

ENROLLMENT OF CITIZENS.

A very general impression exists among those unacquainted with conditions in Indian Territory that the work of making rolls of "Indians" is a comparatively simple matter, susceptible of accomplishment in a short space of time. Were Indian Territory merely a reservation peopled only with full-blood Indians, that impression would have foundation in fact, but Indian blood, unfortunately, is not the sole qualification for citizenship in Indian Territory, and, indeed, as will be seen later, if other requisites are not lacking, it is not even an element. In other words, certain arbitrary laws and decisions govern the Commission in determining who are and who are not eligible to enrollment. For example, were a full-blood Cherokee Indian from North Carolina now to present himself for enrollment to the commission, his application would be rejected; whereas, were a white man to now contract marriage with a Choctaw or Chickasaw, conformable to the laws of those nations, he would be entitled to enrollment. When completed the citizenship rolls of the Five Civilized Tribes will be found to contain the names of full-blood Indians, negroes, and white men, with every intervening degree of blood.

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Page 11.

The Act of June 28, 1898 (Appendix No. 1, p. 31) makes it the duty of the commission to prepare ten separate rolls, viz:

- Cherokees by blood, intermarriage, and adoption.
- Cherokee freedmen.
- Delawares (in Cherokee Nation).
- Creek Indians.
- Creek freedmen.
- Seminoles, Indians, and freedmen.
- Choctaws, by blood, intermarriage, and adoption.

Choctaw freedmen.

Chickasaws, by blood, intermarriage, and adoption.

Chickasaw freedmen.

To accomplish this work the commission is authorized "to take a census of each of said tribes or adopt any other means by them deemed necessary to enable them to make such rolls." A further provision of the law makes it incumbent upon the commission to make rolls "descriptive of the persons thereon, so that they may be thereby identified."

Roughly estimated, the number of citizens to be thus enrolled in each nation may be stated as follows:

Cherokees	30,000
Cherokee freedmen.....	4,000
Delawares	1,000
Creeks	10,000
Creek freedmen.....	6,000
Choctaws	16,000
Choctaw freedmen.....	4,250
Chickasaws	6,000
Chickasaw freedmen.....	4,500
Seminoles	3,000

Immediately upon the passage of the Curtis Act the commission made preparations to enter actively upon the duty of making "correct rolls" of citizens. Those commonly termed a "census," the method pursued is not to be compared with the work which properly comes under that term in enumerating the people in the States. A house-to-house visit would be impracticable in the highest degree for the reasons which will appear later. Previous experience of the Commission had demonstrated the impossibility of securing hotel accommodations in the interior of the various nations, even where towns of moderate size had sprung up, and for the commission to secure suitable food and lodging in the more sparsely settled districts and among the full-bloods was not to be thought of. There could be no question, however, as to the desirability, if not the absolute necessity, of the commission visiting well distributed points throughout the interior, as in no other manner could the full-bloods be induced to *present themselves for enrollment*, and any other method would entail too much expense upon the applicants.

The commission, therefore, purchased the necessary equip-

ment for its maintenance in the field, such as tents for office, sleeping, dining, and cooking purposes, kitchen utensils, wagons, and mules for transporting the equipment from place to place, and such supplies as were necessary for the subsistence of the party, and the transaction of business.

Prior to the passage of the Curtis Act the commission had devoted some time to the enrollment of Creeks. The effort, however, was attended with only partial success, owing to the favorable sentiment entertained by full-bloods toward the "blanket policy," and their revulsion of feeling toward a change of conditions, in which they were supported by the principal chief, himself a full-blood. Provisions of the Curtis Act not only required additional information to be secured in connection with each citizen's enrollment, but required a separate roll of Creek freedmen, with additional restrictions. The information already secured in the Creek Nation was, therefore, not sufficient to comply with the law, and the commission found it necessary to include that nation in its plans for enrollment work. Appointments were made and advertised by methods best adapted for the class of people to be reached, covering the Seminole, Creek, and Chickasaw nations, in the order named, and extending to November, 1898.

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Page 13.

CREEKS.

Many more difficulties presented themselves to the commission in the enrollment of Creeks, and their enrollment was not completed at the appointments made. Their enrollment, however, is gradually being effected, as will appear under another head.

Page 18.

LAND OFFICES.

The rules and regulations of the Department, prescribed October 7, 1898, to govern the selection and renting of prospective allotments (Appendix No. 8, p. 81) contain the following provision:

" * * * to give effect to the provisions of said act ac-

cording to its design, and to enable every member of each tribe to select and have set apart to him lands to be allotted to him in amount approximating his share as aforesaid, the Commission to the Five Civilized Tribes is instructed as a means preparatory to and in aid of the duty of allotment of the lands of said tribes, required of it by said act, to proceed as early as practicable to establish an office within the territory of each tribe, provided with proper and suitable records, including a copy of the United States survey of the lands of the tribe, for the purpose of registering each and every selection of lands made by any member of the tribe for his allotment." * * *

It was not deemed by the Commission practicable to attempt the establishment of such offices in all five tribes until a satisfactory method of procedure and system should have been devised and established in one, and by practical experience demonstrated as productive of satisfactory results, and until the rolls of citizens in those tribes should be closed.

The initiatory work being experimental and requiring the close attention of the commission, such office was established at Muskogee, in the Creek Nation, where the general office of the commission is located, thus enabling the commission to better superintend its operations. Due notice was given by publication, as required by the rules of the Secretary, and the office opened for the selection of allotments on April 1, 1899.

As has already been indicated, the full-bloods of the Creek Nation have been slow to accede to the policy of the Government as expressed in recent legislation, and the work of enrolling has been materially retarded by a clear determination on their part to ignore the requirements of the commission. Upon the establishment of a land office at Muskogee, however, it became evident to them that unless they appeared for enrollment they would not be permitted to select their lands, and they have since been presenting themselves for enrollment.

To accomplish the work of enrollment and recording the selections of the Creeks, the commission found it practicable and of material advantage to place an enrolling clerk in the land office. By this method each applicant is examined as to his citizenship before he is permitted to make application for a selection, saving much time to the land office proper. If, on entering the land office, the applicant is found to be

already enrolled on a card, and his citizenship is undoubted, he is at once furnished with a certificate of enrollment. (Exhibit No. 5, p. 60.) If not, the necessary data is secured and enrollment made as described under the head "Enrollment of citizens," the commissioner in charge of the land office passing upon all doubtful claims. * * *

Excerpt from Report of the Commission to the Five Civilized Tribes to the Secretary of the Interior, Fiscal Year Ending June 30, 1900.

* * * * *

Page 10.

"The character of the final allotment necessitates an amount of preliminary work unknown to any other allotment in which the Government has hitherto engaged. It requires the allotment of all the land in the Territory, except such as is reserved for town site and public purposes, to those who shall be determined by specific adjudication to be citizen Indians. The allotment is not to be of an equal number of acres to each allottee, but by equality of value as the value shall be determined by locality, fertility of soil, or any other element affecting values. The work must be so done that, when completed, each allotment will be as near as possible of equal value with every other. It follows that there is no certainty that any two of all the allotments will contain the same number of acres. This equalization of values is attended with great difficulty, and, to be of any value, requires a personal knowledge by the Commission of all that concerns value in every locality of all parts of an area equal to that of the State of Indiana. This allotment is to be to such persons only as shall, by a prescribed method be determined by the commission to be entitled to citizenship. No existing roll is conclusive of such citizenship, but the commission is, under the law, making new rolls of all citizens in its opinion entitled to enrollment. There are believed to be in the aggregate some 70,000 citizen Indian entitled to allotment, but many times that number claim the right. Judicial decisions, many involving difficult legal questions, are required of the commission in each case."

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Excerpts from the Report of the Commission to the Five Civilized Tribes, to the Secretary of the Interior for the Fiscal Year Ending June 30, 1900.

From page 19 of said report.

"In preparing the rolls of citizens of the Creek Nation many difficulties have been encountered. A large element of full-blood Creek Indians have been, and still are to some extent, very much opposed to severing their tribal relations and accepting allotments of land in severalty. From the inception of the work of enrollment, in the fall of 1897, these full-bloods have not only retarded it by their refusal or indisposition to appear before the commission for enrollment, but have used their influence to deter the more conservative Indians from enrolling. It was this same element which caused the commission much trouble and inconvenience in procuring the authenticated tribal rolls of the Creek Nation, which were not secured until after the passage of the Act of Congress, of June 28, 1898, commonly known as the Curtis Act. Before the passage of this act the Commission possessed no legal authority to compel the production of these rolls, and was unable to make a satisfactory enrollment under the then existing conditions.

Under the act of congress of June 10, 1896, and the act amendatory thereof of June 7, 1897, authorizing the commission to make rolls of citizenship of the Five Nations in the Indian Territory, a census was taken, beginning in the fall of 1897, of all citizens of the Creek Nation, freedmen included. The commission, not being in possession of the rolls was compelled to go on with the work without them, and could only rely upon such information as was furnished by the town kings of the several Creek towns, and the applicants or their friends and relatives who appeared before the commission to be listed as citizens. While the census thus taken is not a roll of citizens, and was never intended to be regarded as such, it nevertheless has served its purpose and has been of great assistance in making the rolls.

The act of Congress of June 28, 1898, authorized the commission to secure the Creek Tribal rolls. After many delays, caused by the reluctance of the Creek authorities to deliver them to the commission, the rolls have all been secured from

time to time, with a few exceptions, and are now in possession of the commission. The rolls thus secured consist of the authenticated tribal roll of 1890, the roll of Creek freedmen made under the authority of the United States, prior to March 14, 1867, commonly known as the Dunn roll, the 1891 omitted roll, all of the town pay rolls of 1895, excepting those of Arbekochee, Canadian Colored, Broken Arrow, Ketchapataka, Lochapoka, Nuyaha, Taskegee, Thlewathle, Tuckabatchee, Tulladega, Tullahaschochee and Tulwathlochee towns.

Among the many other difficulties encountered in the enrollment of the Creeks is the identification of persons from the rolls. Many of the full-blood Indians have been known by five or six different names, such as Creek or Euchee name, English names, Busk names (a name given them by the tribal band to which they belong), and possibly a name given them while attending school, while many have also been known by their given names. An actual case illustrates the difficulty of identification. One John Buck appears before the commission for enrollment. A careful search is thereupon made on the rolls for his name, resulting in its not being found. After diligent search for different other names by which he has been known, his name is finally found on the rolls as "co e cath tahny Yah lah pon co conthlany."

Since the commission secured possession of the Creek tribal rolls, coupled with the fact that the opposition heretofore referred to is gradually being overcome, and that the more radical Indians are beginning to realize that it is to their best interest to be enrolled, the work of making the rolls of citizenship is satisfactorily and gradually nearing completion.

From Page 21 of said Report.

A very difficult problem to determine is the actual number of recognized citizens in the Creek Nation who are entitled to be enrolled as such, as there is no satisfactory enumeration. The commission took a census of the nation in 1897 and 1898, but as a large number of Indians refused to appear before the Commission and furnish any information concerning themselves or their neighbors, the census then taken was neither complete nor satisfactory. By reference to Table (p. 20), it will be seen that the total number of names on the rolls of 1890 and 1891 is 14,795, while the number

names on the 1895 roll is only 13,689, showing a reduction of 926 names in a period of four and five years. This reduction is accounted for from the fact that the Creek authorities discovered that a large number of names had been fraudulently placed on the rolls for a pecuniary consideration, and that the names of many deceased persons had been left thereon in order that interested parties might participate in the per capita payments. Upon the discovery of this fact in 1895, the Creek council created a special committee, commonly known as the "Committee of Eighteen," which was given full power to revise the rolls, and eliminate therefrom the names of all deceased persons and all persons who had been placed thereon fraudulently. Pursuant to the authority thus conferred, this committee erased a large number of names of noncitizens and deceased persons from the rolls. By an act of Creek council of May 30, 1895, a citizenship commission was created, whose duty it was to sit as a high court to settle and determine all cases brought before it, involving the right of citizenship in the Creek Nation. This commission was given further authority by an act of the Creek council, approved August 10, 1896, to examine the census rolls of 1895, and satisfy itself of their correctness, and correct them by erasure of noncitizens and deceased persons and by the addition of children, and submit the rolls so amended to the council for its approval. The rolls so amended were submitted to and approved by the Creek council in 1896, and are the last authenticated rolls of Creek citizens. In view of this fact and the further fact that a large number of those unaccounted for on the 1895 rolls are undoubtedly either non-citizens or dead, it is estimated that the total number of recognized Creek citizens will not exceed the total number of names appearing on these rolls.

From Page 22 of said Report.

The total number of Creek Indians enrolled to date is 6,060. Of this number 147 were born since the 1st day of July, 1899, and 14 are classed as doubtful. The enrollment of these children has been made for the reason that no date has been determined for closing the rolls. The Creek Agreement of February 1, 1899, which was not ratified by Congress, provided that: "No person born to any citizen after June 30, 1899, shall be entitled to enrollment." The agree-

ment of March 8, 1900, now pending for ratification, extended the time to July 1, 1900. There being no existing law or agreement designating the date for closing the rolls, this enrollment is being continued.

Excerpts from Annual Report of "Five Civilized Tribes for the Fiscal Year Ending June 30, 1901.

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Page 30.

Allotment of Lands—Creek Nation.

Since the opening of the Creek allotment office in April, 1899, 10,617 persons have appeared before the Commission and made application to select allotments. Of this number 9,557 have received a preliminary allotment of 130 acres, and 1,060 have made partial selections. The selections made up to and including June 30, 1901, cover an acreage of 1,626,917 acres. A comparison of the allotment of lands with the classification made by the commissioner's appraisers in the field shows that ninety-five per cent of the land selected has been distributed in the various classes which donates agricultural land.

In the commencement of the so-called "Snake uprising" over 200 selection certificates issued by the Commission were returned to this office, no explanation being given save that occasionally a statement was made that the land was not desired. A large number of these certificates were returned to the commission by the United States marshal for the northern district, who secured them upon the arrest of the leader of this faction, and these certificates have been again mailed to the allottees.

During the appointment of the Commission at Okmulgee during the month of May, referred to under the head of "Enrollment of Creek citizens," the allotment office for that tribe was maintained at the same point in conjunction with the allotment office at Muskogee, the two offices being connected by telephone, of which constant use was made during the day. More than 800 applicants for allotment were received during this appointment, and the physical resources of the clerical force of the Commission at that point were taxed to their utmost to dispose of the work devolving upon

it. Most of these applications were those of full-blood Creek Indians, for whom interpreters were required.

Unusual activity in the matter of selecting allotments was displayed during the month of June when the discovery of petroleum was made near the town of Red Fork, in the Creek Nation. For the most part these applications for allotment in this vicinity were stimulated by the action of speculators, who desired to secure leases from the citizens who might secure the lands in that vicinity in allotment. The Commission exercised all possible care to see that the best interests of the Creek citizens were subserved.

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Excerpts from Reports of the Commission to the Five Civilized Tribes to the Secretary of the Interior, for Fiscal Year Ending June 30, 1902.

Page 13.

* * * * *

There has never been maintained by the tribes any strictly authentic rolls of citizenship of the Choctaw and Chickasaw Nations, and the 1896 citizenship rolls of these two tribes, which have been used as a basis in the preparation of the final rolls of the two nations, present many inaccuracies. In numerous instances names of persons appearing thereon were placed there by fraud or without authority of law.

Considerable time and labor have been expended during the last fiscal year in ascertaining the exact status of persons whose names appear upon such rolls and determining whether they are entitled to enrollment by this Commission under the provisions of the twenty-first section of the Act of Congress of June 28, 1898 (30 Stat. L., 495).

The Commission was not aware at the inception of the enrollment of the citizens of these two tribes of the extent of inaccuracies and the irregularities that existed in the tribal rolls which were used as a basis for enrollment by the Commission, and accordingly during the first two years of the progress of this work numerous persons whose citizenship was later to prove questionable applied to the Commission, were identified from the tribal rolls, and regularly listed for enrollment.

* * * * *

Early in the present calendar year a number of prominent Cherokees of wide acquaintance in each district in the Cherokee Nation were summoned before the Commission at Muskogee, and with them the tribal rolls were carefully checked, and as far as possible the names of the dead were stricken from said rolls. Many names were in this way eliminated from the list of unenrolled, but there still remained on April 1, 1902, unaccounted for on the Cherokee census roll of 1896, which was used as a basis, 5,439 names.

The Keetoowah organization, embracing in its membership practically all of the unenrolled full bloods, strenuously opposed by every means in its power the making of rolls of citizens; and in February, the United States court for the northern district of Indian Territory, was applied to for an order directing certain leaders of said society to appear at Muskogee, Ind. T., on the 29th day of February, 1902, and have themselves and families enrolled. At later dates other influential full bloods who had been opposing enrollment were also brought to Muskogee by court process.

In every instance when faced with the alternative of enrollment or imprisonment the parties summoned elected to enroll, though a few suffered confinement for a brief period before acquiescing. It was hoped that the enrollment of these leaders would materially assist the work of the parties sent to the field.

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Births and Deaths.

In the matter of ascertaining and recording the deaths that have occurred since the enrollment of Cherokee citizens began, but little progress has been made, owing to the great difficulty experienced in obtaining affidavits of reliable persons.

During the year many affidavits as to the births of children whose parents were previously listed for enrollment have been received.

Approximately 1,400 birth affidavits were filed with the Commission and the children listed for enrollment as follows:

On regular Cherokee cards.....	1,159	
On doubtful Cherokee cards.....	92	
On rejected Cherokee cards.....	1	
On regular Delaware cards.....	31	
On doubtful Delaware cards.....	4	
	<hr/>	1,287
On regular freedmen cards.....	64	
On doubtful freedmen cards.....	49	
On rejected freedmen cards.....	2	
	<hr/>	115
Total		<hr/> 1,402

Summarized Statement of Applications.

The number of applications heard since the enrollment of Cherokee citizens was begun is 14,750, embracing 43,425 applicants. These applicants have been classified as follows:

On Regular Cards.

Full-blood Cherokees	6,459	
Full-blood Shawnees	212	
Full-blood Delawares	342	
Mixed-blood Cherokees	21,159	
Mixed-blood Shawnees	608	
Mixed-blood Delawares	694	
Intermarried whites (both sexes).....	2,037	
	<hr/>	31,511

On Doubtful Cards.

Full-blood Cherokees	111	
Full-blood Shawnees	14	
Full-blood Delawares	13	
Mixed-blood Cherokees	2,360	
Mixed-blood Shawnees	146	
Mixed-blood Delawares	30	
Intermarried whites (both sexes).....	630	
	<hr/>	3,304

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CREEKS.

During the fiscal year ending June 30, 1902, the work incident to the enrollment of Creeks has been mainly confined to securing a more complete identification of a large number of citizens who were listed for enrollment by the Commission in 1897 and 1898, while there was yet lacking that full authority and means for procedure which later legislation conferred and prescribed; to considering enrollment and memoranda cases and preparing and rendering decisions therein; to securing the necessary information to bring the work of the Creek enrollment within the provisions of sections 28 and 29 of the act of Congress of March 1, 1901 (31 Stat. L., 861), with respect to who of those citizens enrolled prior to April 1, 1899, were living on that date, and whether children born prior to July 1, 1900, were then living; to preparing partial rolls of citizenship for review by the Secretary of the Interior, and to issuing certificates of enrollment for persons who desired to make application for their individual allotments of land, or for persons whom they represented, and for persons to whom the Commission has made arbitrary allotments.

The act of Congress of March 1, 1901 (31 Stat. L., 861), which was ratified by the Creek National Council, May 25, 1901, provides for the enrollment of all citizens of said nation entitled to be enrolled under section 21 of the act of Congress of June 28, 1898 (30 Stat. L., 495), who were living on the first day of April, 1899, and for the enrollment of all children born to citizens so entitled to enrollment, up to and including July 1, 1900, and then living. Said act of Congress also provides that no person whomsoever shall be added to the rolls after the date of its ratification.

It therefore became necessary to determine who of these children were living on April 1, 1899, and who of said children born subsequent to that date were living on July 1, 1900. Many of the Creek officials rendered valuable assistance in the prosecution of this work, and very satisfactory progress was made. As a number of the kings and warriors refused to give any information or render any assistance, a field party was organized and sent into the full-blood settlements for the purpose of securing all information possible

regarding the enrollment of these citizens. During the months of August, September, and October, 1901, this party had appointments at Eufaula, Proctor, Wetumka, Holdenville, Morse, Okmulgee, Senora, and Checotah. At Eufaula, Proctor, Morse and Senora considerable opposition was made by the full-bloods to the prosecution of the work. Notwithstanding this opposition, all of the known Creek citizens for whom additional information was required residing in the localities visited by this party were fully identified or accounted for otherwise.

The following is a statement showing the work accomplished by this party:

Number of citizens identified and found to be entitled to enrollment	1,124
Number of citizens found to have died prior to April 1, 1898	352
Number of persons found to be residing outside of Creek Na.	102
Total number of persons accounted for	1,578

In addition to the above work this party secured 268 proofs of death of citizens who died subsequent to April 1, 1899, and who were listed for enrollment on regular cards, 53 birth affidavits, and 76 supplemental proof for children born between April 1, 1899, and July 1, 1900.

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Page 41.

ALLOTMENT OF LAND.

CREEK NATION.

The allotment of land in the Creek Nation was commenced on April 1, 1899, a preliminary allotment of 160 acres being given alike to Creek Indians and Creek freedmen. This work was instituted under the act of Congress of June 28, 1898 (30 Stat. L., 495), and was constituted under the Creek agreement approved by the act of Congress of March 1, 1901 (31 Stat. L., 861), which latter legislation confirmed allotments previously made and, in terms, authorized a continuance on the lines adopted by the Commission.

Out of the total acreage of 3,172,813.16 acres there has now been allotted 2,177,262.44 acres; 550,345 acres of this amount were allotted during the fiscal year ending June 30, 1902, or practically 1,800 acres a day.

A total of 13,144 complete allotments, of 160 acres each have been made; 1,331 of these were arbitrary allotments made by the Commission for those who persistently refused or neglected to act for themselves, and the remainder were selected by the allottees or their recognized representatives. Partial allotments have been made to an additional 728 persons, and while the exact number of citizens is yet to be determined, it is not believed there remain more than 1,350 allotments to be made out of a total of 14,500.

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Excerpts from the Report of the Commission to the Five Civilized Tribes to the Secretary of the Interior for the Fiscal Year Ending June 30, 1903.

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Page 7.

The object of Congress from the beginning has been the dissolution of the tribal governments, the extinguishment of the communal or tribal title to the land, the vesting of possession and title in severalty among the citizens of the tribes and the assimilation of the peoples and institutions of this Territory to our prevailing American standard.

It was evident at the end of the first five years that the accomplishment of the foregoing object by negotiation alone was practically impossible. The Indians (so called, for most of them by a century and a quarter of intermarriage have far more Saxon than Indian blood) would never surrender by consent what they did not want to give up at all. The Commission, as then constituted, was able to bring to the discussion neither inducements nor force. Some of the tribal members held passionately to their institutions from custom and patriotism, and others held with equal tenacity because of the advantages and privileges they enjoyed. It was almost worth a man's life at that time to advocate a change.

Under these conditions Congress was, in 1898, fairly confronted with the alternative of either abandoning its policy and abolishing the Commission, or else of converting the

Commission from merely a negotiating body into also an executive and semi-judicial body, and of proceeding with the work under the constitutional power of Congress, and largely, at least, regardless of the will of the tribes.

A strenuous effort was made to prevent the adoption of the latter course. So pronounced was the opposition and so severe were the criticisms heaped upon the Commission that at one time there seemed to be no doubt of success for those who favored this policy. But in what may be deemed a fortunate hour it was decided not to act without giving a chance to the special representatives of the Government to be heard, both in their own defense and with respect to what course should be adopted. This led to such a revelation of slander, corruption and oppression that Congress immediately passed the Curtis act, and it has been followed by prompt appropriations for its execution, amounting now to nearly \$1,000,000.

That act undertook not to let anybody and everybody come forward and take public land, but to administer upon five great estates, aggregating 20,000,000 acres. It ordered these estates to be partitioned among the individual heirs upon the principle of equal value, and it could hardly have done less, and at our expense, under the stipulations of treaties.

Nor was it a disposition of wild land, or of lands of uniform value. It related to vast tracts covered by the homes and other improvements of a great population, threaded in every direction with railroads, filled with villages and large towns of the most modern character, and without a wigwam or a blanket Indian within the limits of the Territory.

It was a vast and difficult undertaking, and no previous disposition of either lands or tribes afforded precedents for guidance.

Manifestly two indispensable duties lay at the very beginning of the business.

First, to determine who were the *bona fide* citizens or heirs entitled to inherit these properties; and second, to take an inventory of the properties to be divided.

When these two tasks had been performed as to any tribe, then only was it possible to begin the intelligent and equitable division of its estate. There was practically nothing to go upon in either instance, and the whole work had to be done from the beginning.

In determining the heirs, the Commission has heard and passed upon the individual applications of more than 200,000 claimants; and of this number some 128,000 have been so disposed of since the passage of the Curtis act. All of these cases had to be made matters of record, many of them involving hundreds and some of them thousands of pages of evidence and pleading; and of the total number more than half have been rejected as not entitled to share in the properties of the tribes.

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Page 10.

Enrollment of Citizens.

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By the agreements consummated during the fiscal year ending June 30, 1903, the time within which the Commission might receive applications for enrollment as citizens of the Choctaw, Chickasaw and Cherokee Nations is defined, and only in the Creek Nation are applications for enrollment still being received.

Since the work of enrollment was commenced (excluding applications for citizenship adjudicated under the act of Congress approved June 10, 1895) applications for the enrollment of 128,406 persons have been made to the Commission. The general classification of these applicants is as follows:

Seminoles	3,079
Choctaw (Miss. Choctaws included) ..	50,740
Creeks	15,257
Chickasaws	13,176
Cherokees	46,154
<hr/>	
Total	128,406

Excerpts from Reports of the Commission to the Five Civilized Tribes to the Secretary of the Interior for Fiscal Year Ending June 30, 1904.

Page 9.

"How were the lists or rolls of membership to be got? The tribal rolls already in existence were most of them old, and besides they were so honeycombed with fraud that the whole question was ordered by Congress to be gone over and determined anew. Had written applications been allowed, and personal appearance and examination dispensed with, the labor of the task would have been greater than it has been and frauds would have been greater than ever.

As it was, every adult or head of a family in a total of more than 200,000 citizens and claimants was personally examined and his previous tribal record was looked up. Of this number, and in this way, more than 120,000 have been examined since June 28, 1898. The proceedings were all taken down, especially as every case could be carried to Washington on appeal, and often the record of a single case was hundreds of pages in extent. Of the above number of people, approximately 50,000 will be finally adjudged to lawfully possess tribal membership and property rights; and it can readily be seen how a less careful course of procedure would have utterly dissipated the properties of the tribes."

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Page 11.

Enrollment of Citizens.

No original applications for enrollment were received by the Commission during the past year, save the Creek Nation, the citizenship rolls of the other tribes having been finally closed by the respective agreements. This branch of the work has, therefore, consisted mainly in the disposition of pending applications and the preparation of schedules, or partial rolls, containing the names of persons found to be entitled to enrollment.

In the Seminole Nation the work of enrollment has long been completed. The following table indicates the general condition of enrollment work in the other four tribes:

Tribes.	Applicants.	Enrolled.	Denied.	Undetermined.
Creek	16,948	15,359	547	1,042
Cherokee	46,418	35,450	1,568	9,400
Choctaw and Chickasaw....	60,619	33,220	21,832	5,567
Total.....	123,985	83,999	23,947	16,009
* * *	*	*	*	*

Page 23.

Births and Deaths.

During the year there have been filed 61 affidavits of birth and 77 death affidavits as to persons who, it is claimed, are entitled to enrollment. At the close of the year there are pending 118 affidavits of birth and 103 death affidavits, to dispose of which applications further evidence is necessary. Experience has shown that the statements of the affiants cannot be relied upon and the testimony of two or more competent witnesses is required in each case. Supplemental proofs in the matter of the enrollment of 10 children born to Creek citizens subsequent to the date of the last authenticated Creek tribal roll have been filed, in which cases affidavits of birth had previously been filed, but the Commission was not satisfied as to their right to enrollment. These cases have received careful attention, and were disposed of as the facts warranted.

Affidavits have been received evidencing the death of 111 persons regularly enrolled as citizens of the Creek Nation and for whom allotments were selected during their lifetime. These affidavits were for use of the Creek land office in making allotments to the heirs of said deceased persons.

Final Roll.

There were reported to the Department for approval during the past fiscal year the names of 282 Creek citizens by blood and 519 Creek freedmen who had been regularly listed for enrollment by the Commission, and whose enrollment as such was approved by the Secretary of the Interior.

The names of 19 persons, 12 Creeks by blood and 7 freedmen, heretofore enrolled as citizens of the Creek Nation, and their enrollment as such approved by the Department, have

been canceled from the final roll by departmental authority, evidence having been submitted to the Commission and report made to the Department showing that they were not entitled to have their names appear thereon or were duplicated on the roll under other names.

The following table indicates the status of enrollment work in the Creek Nation:

	Applicants.	Enrolled.	Denied.	Pending.
Creeks by blood.....	10,994	9,893	380	661
Creek freedmen	5,954	5,466	167	381
Total.....	16,948	15,359	547	1,042

Page 24.

CHEROKEES.

No original applications for enrollment as citizens or freedmen of the Cherokee Nation have been received since October 31, 1902. Perhaps greater difficulty has been experienced in the preparation of the final rolls of the Cherokees than in any other tribe. The rights of intermarried whites and freedman have been the subject of protracted litigation. As a result the Commission has much of the time been powerless to proceed with the enrollment of these classes of citizens, and even now the rights of the intermarried citizens are being contested in the Court of Claims, so that nothing can be done by the Commission as to their enrollment.

The injunction of the United States Court against the enrollment of a certain class of Cherokee freedmen, mentioned in the Commission's tenth annual report (Appendix No. 6, p. 142), was dissolved on August 25, 1903, and no appeal having been taken, the work of deciding cases which had been suspended by reason of the injunction proceedings was immediately taken up.

* * * * *

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CHOCTAW AND CHICKASAW NATIONS.

Toward the close of the year it appeared that a number of persons whose enrollment had been approved by the Secre-

tary of the Interior for a period of more than twelve months had not presented themselves at the land offices for the purpose of selecting their allotments. Acting under authority granted by the provision of law quoted, the Commission notified such citizens that unless they made selection of their allotment within thirty days from the date of such notice land would be arbitrarily allotted to them by the Commission. At the same time two parties were placed in the field for the purpose of locating the improvements owned by this class of citizens in order that the Commission, in designating their allotments, might include therein the land upon which they owned improvements.

Page 43.

WASHINGTON, September 30, 1903.

The Secretary of the Interior.

SIR: I am in receipt, by reference of the Acting Secretary, September 9, 1903, of the letter of the Commissioner of Indian Affairs of September 5, 1903 (Land, 4798-1903), transmitting a communication from the chairman of the Commission to the Five Civilized Tribes, dated August 28, 1903, and resolutions that day adopted by them relative to selections of allotments by full-blood Indians of the Choctaw and Chickasaw Nations, with request for my opinion "whether said resolutions should be approved as they stand or modified; and if so, in what particular, or what action the Department should take in the premises."

The resolutions and preamble thereto are as follows:

"Whereas it has come to the knowledge of the Commission that certain full-blood Indians have been taken to the land offices in the Choctaw and Chickasaw Nations by agents and speculators, where selections were made by such Indians of their allotments; and

"Whereas it is reported that such Indians have entered into contract with such agents and speculators for the lease of the lands so selected at unreasonable prices; and

"Whereas notices have been served upon divers parties to show cause at times fixed in said notices why certain selections of allotments in the Chickasaw Na-

tion, where such selections are in separate tracts, widely separated, should not be canceled and set aside; therefore,

"Resolved, That until further ordered no allotments shall be made to full-blood Indians taken to the Choctaw or Chickasaw offices by agents or non-citizens.

"Resolved, That all selections where the land selected is divided into different tracts, rendering such selections less valuable or desiring than otherwise, be canceled after due notice unless the person making such selection show good cause why the same should not be done.

"Resolved, That no selection of allotment be permitted where it is disclosed that contracts have been made for the lease thereof or the sale of any interest therein, and that the Commission cancel all selections made by full-blood ignorant or indigent Choctaws where contracts have been made of any kind affecting the title of the lands so selected before or after selection, previous to the issuance of a certificate of allotment, and all other selections made by said full-blood ignorant or indigent Indians which, upon examination, are found not to be in the interest of said Indians."

The Commission say the proposed modification in the manner of making allotments meets the objections presented by counsel for the Indian nations, and provides reforms deemed by the Commission to be for the best interests of this class of citizens, but the Commission expresses doubt as to its authority to exercise the powers proposed to be assumed under the last resolution and will not, for that reason, take action thereunder until advised of its approval.

The Indian Office expresses no opinion at length upon the first resolution, but gives its reasons for the opinion that the second one violates the rights accorded to individuals by the agreement and statute providing for allotments of land to the Indians in severalty, and that no authority of law exists for exercise of the power to be assumed under the last one, and recommends that none of the resolutions be approved.

The clear intentment of the agreement between the Choctaw and Chickasaw Nations and the United States, ratified by the act of July 1, 1902 (32 Stat., 641), is that the indi-

vidual entitled to allotment may select for himself and take any lands subject to allotment. By section 6 the word "select" is defined as "the formal application * * * for particular tracts of land." Section 12 provides that "each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead," etc. Section 17 makes express provision for selection by the Commission, "if for any reason an allotment should not be selected" by or on behalf of the person entitled; and section 21 provides for selection of the allotment due a deceased person, to be made by the executor or administrator, and, in case of his default, then by the Commission. These provisions necessarily imply that the individual entitled to an allotment is entitled to select the land, subject to the other conditions that selection must be made of allotable land and in subdivisions of not less than ten acres or a "quarter of a quarter of a quarter of a section." The law does not require that selections or allotments shall be made of contiguous tracts or so as to form a compact body of land. No such restriction upon the right of selection having been imposed by the law, I am of the opinion that the allottee is free to make his selection of non-contiguous tracts and that the second resolution is unauthorized and should not be approved. The law having given the allottee the right of selection, his judgment of what is most valuable, desirable, or advantageous to him is not subject to review or control by the Commission or allotting authority.

The duty of the Commission no doubt is, so far as it can, to protect the Indian, who is to some extent its ward, from imposition and undue influence by designing and evil-minded persons. When it has reason to suspect that the applicant is acting under such influence, it may in any particular case take such measures as will enable the applicant to exercise his own free choice, such as to require the suspected person, "agent, or non-citizen" to withdraw, or by calling in some known and intelligent, trustworthy citizen or other person known to the applicant and capable of conversing with him in his own language, to confer with, advise, and aid the allottee. No formal resolution or rule is necessary to confer such authority. It is the nature of things inherent in all courts, quasi-judicial bodies, or executive officers when called upon to act in respect to the rights of persons of weak intelligence or will, or where such conditions are merely suspected to exist.

The objections to the second of these proposed resolutions

or rules for procedure necessarily involves the rejection of the third. It is objectionable for other reasons. When a selection has been made rights presumably vest. When such selection is approved and the allotment is made, the equitable right becomes apparently complete. No power is expressly vested in the Commission or in the Indian Office, of its own motion, to review such action. Whether it may do so at the instance of the allottee and after notice to all others claiming to have acquired rights under him is not presented by the papers before me, and no opinion need be expressed. But it would seem that, prior to vesting of legal title in the allottee by delivery of the allotment deed, the powers of the Indian Office and Commission are analogous and similar to those of the Land Department prior to issue of patent to public lands.

I am of the opinion that the second and third resolutions should not be approved in their present form or in any modified one having substantially the same object, and that the Commission already has all the power that approval of the first resolution could confer, so that no action of the Department in the premises is necessary.

It may be deemed necessary to prescribe regulations in respect of these matters for the guidance and control of clerks in charge of land offices. If so, they should be prepared in accordance with the views suggested herein and submitted for the consideration of the Department.

Very respectfully,

F. L. CAMPBELL.
Assistant Attorney General.

Approved September 30, 1903.

THOS. RYAN,
Acting Secretary.

Excerpt from Report of the Commission to the Five Civilized Tribes, Dated at Muskogee, Ind. T., June 30, 1905.

Page 8.

ENROLLMENT OF CITIZENS.

The work of enrolling the members of the Five Civilized Tribes in Indian Territory may be classed under three general heads:

First, the reception of applications for enrollment.

Second, the determination of the rights of the applicants.

Third, the actual placing of the names of those entitled to be enrolled upon the final rolls for approval by the Secretary of the Interior.

The first has occupied a space of nearly nine years, the work having been commenced under the act of June 10, 1896, and ended June 2, 1905, with the expiration of the time allowed for the enrollment of Seminole children by the act of March 3, 1905. Obviously the completion of the work assigned to the Commission was an impossibility so long as the rolls were kept open by law and names were being constantly added to them. It is believed that since the reception of applications was commenced ample opportunity has been afforded every person who has any claim to citizenship in Indian Territory to lay his case before the Commission. The Commission's enrollment parties have visited every part of the Indian Territory, carrying its voluminous records and its extensive camping paraphernalia into regions rarely if ever before visited by the white man. More than one hundred thousand citizenship claims have been presented to the Commission, and volumes of testimony and evidence have been submitted in connection with them. It has required an elaborate system of records and indexes to keep track of these numerous applications, and the constant correspondence in connection therewith has reached into hundreds of thousands of letters.

In the second procedure it is necessary to have the services of law clerks who are familiar not only with the United States laws governing the enrollment of these Indians, but with their own tribal laws and customs under which citizenship rights were acquired and lost. Where applicants are shown by the tribal records to be beyond question *bona fide* citizens of the respective tribes, the determination of their right to final enrollment is a simple matter. But many persons were manifestly entitled to be enrolled whose citizenship status was not a matter of record with the tribes, and many others were named upon the tribal rolls who were in nowise entitled to share in the distribution of their common property.

* * * * *

Page 9.

the Indian languages recognize no such thing as gender. full-blood invariably speaks of his wife as "he," and pertinently names his daughters "Willie," "Joseph," "David," the like. Strapping youths with no outward mark of manhood sometimes answer to such remarkable names as "William," "Pearl," or "Josephine." Surnames are changed at night. "Brown" today will solemnly swear that he is "Green" tomorrow, while "Care-co-con-thla Big Mosquite," armed with a desire for an English name, becomes, without ceremony, plain "John Smith." In some cases two or more children of the same parents are given identically the same name. Information as to the age of both minors and adults is often unreliable, if not absolutely lacking.

Under such conditions it is not to be expected that absolute accuracy could be attained, and it is hoped that such errors as creep into the rolls will not be regarded by the Department as indicating carelessness on the part of the Commission or its employees engaged in the preparation of citizenship rolls.

The methods employed in the enrollment of citizens have been explained to the Department in previous reports, and the following pages are intended only to portray the status of the work in the respective tribes at the close of the last fiscal year.

The general condition of the work may be briefly summed up in the following table:

Applicants.	Enrolled of identified.	Refused of dismissed.	Unde- termined.
Choctaw and			
Chickasaw . . .	66,217	35,638	27,719
Cherokee	46,464	35,394	4,639
Chick	20,110	15,513	1,157
Chinole	3,171	2,750	7
			414
Total . . .	135,962	89,295	33,522
			13,155

In the above table the applicants whose rights have been passed upon by the Commission and are pending before the Department and those whose enrollment is suspended for various reasons are classed as undetermined.

* * * * *

CREEKS.

For a long time the completion of the final rolls of the Creek tribe of Indians was contingent upon the fixing of a date after which no one should be permitted to make application for enrollment. Indeed the whole work of the Commission with respect to the affairs of the Creeks was practically at a standstill on this account. Section 28, of the Creek agreement, approved by Congress March 1, 1901, to-wit:

"No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement * * *"

having failed in its purpose, the closing of the rolls rested with the Secretary of the Interior, as provided in the following language found in the act of March 3, 1901:

"The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, shall alone constitute the several tribes which they represent; and the Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes or either of them for closing said rolls, but upon failure or refusal of said tribes or any of them to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no name shall be added thereto."

It was apparent that so long as the reception of applications for enrollment was continued persons not entitled to be enrolled would endeavor by fraudulent means to have their names placed upon the rolls in order to avail themselves of the property rights which would thus accrue to them.

It appears from a report of the Acting Commissioner of Indian Affairs, dated June 8, 1904, transmitting copy of your telegram, dated June 6, that the Muskogee or Creek Nation has failed or refused to make an agreement providing for the closing of the rolls of said nation, as provided in

act. It is therefore ordered that September 1, 1904, be the same is hereby, fixed as the time when the rolls of Muskogee or Creek Nation, being prepared by you, shall be closed, and that after said date the application of no person whatsoever for enrollment as a citizen or freedman of Muskogee or Creek Nation will be received by your Commission.

E. A. HITCHCOCK, *Secretary*.
L. R. S.

Page 28.

At the time this order was issued there were upon the previous tribal rolls of the Creek Nation something over 4,000 names which had never been accounted for. The Commission has every reason to believe that few, if any, of these names ought to be placed upon the final roll of Creek citizens. Many were dead, some were fictitious names fraudulently placed upon the pay rolls, and others were already enrolled under different names. Still the Commission pursued, as elsewhere, its policy of using every possible precaution to prevent any member of the tribe from sleeping upon his rights or losing his interest in the tribal property, either through negligence or a determination to resist the changes being made in the status of the tribe.

Page 28.

Public notice of the final closing of the rolls was given, and a list, containing every name which appeared upon any previous roll and had not been accounted for, was published and distributed broadcast throughout the country. A party was also sent into the field to visit the communities inhabited by the full-bloods—not merely that they might be given an opportunity to apply for enrollment, but rather to seek out those who had failed or refused to make such application and obtain the information essential to their enrollment. As was anticipated, the principal result of the Commission's effort in this direction was to entail upon it a great amount of work. Many persons bearing names similar to those which appeared upon the advertised list presented themselves before the Commission, claiming to be "lost Creeks," and made application for enrollment. In most cases the applicants

had not a vestige of right to enrollment, but the Commission could well afford to take the trouble of adjudicating these groundless claims rather than deprive any citizen or freedman of his interest in the tribal property by failing to offer every opportunity for enrollment.

* * * * *

Page 49.

On June 30, 1905, the final enrollment of citizens of the Cherokee Nation has been approved as follows:

Cherokees by blood, not including 1,143 citizens by intermarriage whose enrollment was approved but subsequently suspended.....	31,283
Cherokee freedmen	3,923
Registered Delawares	196
Total.....	35,402

Report for the Year Ending June 30, 1906.

Page 12.

Enrollment of Citizens.

After the enactment of the legislation of 1893 it became apparent that the rolls of citizenship of the several tribes as prepared by the tribal authorities were inaccurate and could not be used as a basis upon which to make distribution of the tribal property. It was admitted by the tribal authorities that such rolls contained the names of a number of persons who had been placed thereon by fraud or without authority of law, while the payment rolls contained the names of many persons who in reality never existed.

Under the act of June 28, 1898, the work assumed an entirely new phase. By this act in 1880 authenticated roll of the citizens of the Cherokee Nation was made the basis of enrollment in that tribe, and the Commission was directed to make correct rolls of the citizens by blood of the other tribes, striking from the tribal rolls such names as were placed thereon by fraud or without authority of law; enrolling only

those who were lawfully entitled to enrollment and their descendants born since the rolls were made, together with such intermarried white persons as might be entitled to citizenship in the Choctaw and Chickasaw tribes.

Said act also made provision for the enrollment of Choctaw and Chickasaw freedmen and established the basis of such enrollment. It also authorized the identification of persons claiming rights in the Choctaw lands under the provisions of the fourteenth article of the Choctaw treaty of September 27, 1830.

Field parties were sent into every part of the Territory for this purpose. Each party consisted of a number of clerks and stenographers and carried its camp equipment composed of tents, wagons, cooking utensils, etc. Each camp had to have its teamster and its cook, and, in addition to the camping outfit, it was necessary to carry many records and office supplies, as well as a certain amount of office furniture. It was the endeavor of the Commission to have one of the commissioners with each enrollment party at all times.

Each applicant who appeared before the Commission, either at the general office or its field appointments, was placed under oath and carefully examined as to himself and the members of his family, a card being prepared from his statements containing in brief the family record and the names of the persons for whom he made application. In the majority of these cases a stenographic record was made and preserved.

While each card had a corresponding jacket in which the testimony, documentary evidence, and correspondence relating to the case was filed, the card itself, being more convenient for quick reference, was made to contain as complete a history of the family as possible. Each change in the status of an applicant was entered upon his card, such as the date and nature of the Commission's decision, the placing of each name upon the final roll, the approval of such roll by the Secretary of the Interior, a change in post-office address, the date of marriage or death of an applicant, whenever the same came to the knowledge of the Commission, and other information essential to the determination of the applicant's rights to enrollment. So complete are these cards that certified copies of them are much sought after by those interested in land transfers in the Territory,

and they are generally regarded as authority on matters of family relationship. An accurate index to each card and jacket had to be kept, the names of the applicants being entered alphabetically upon the index with the number of the card and jacket opposite.

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Page 37.

ELIMINATION OF NAMES FROM FINAL ROLL.

In spite of the pains taken by the commission to make the final rolls accurate from the start a number of names were placed thereon which should have been omitted, because the person died prior to September 25, 1902, and were not entitled to final enrollment. These frauds did not develop to any great extent until the work of allotment was commenced. Then it was discovered that the names of many Choctaws and Chickasaws who died prior to September 25, 1902, were included in the final roll.

In order to secure evidence showing the date of death of such persons it was necessary, to send employees into the field, and parties were sent out in both the Choctaw and Chickasaw nations. For many months employees, traveling in an open buckboard, have scoured the country in search of information as to persons erroneously enrolled. In some cases it has been difficult to obtain accurate information, but the work performed along these lines has been generally satisfactory and effective. Evidence has been obtained which led to the cancellation of 1,447 names from the final roll, as follows:

Choctaws by blood.....	1,023
Choctaw freedmen	22
Chickasaws by blood.....	231
Chickasaw freedmen	166
Choctaw new born (act of March 3, 1905).....	2
Chickasaw new born (act of March 3, 1905).....	1
Mississippi Choctaws	2
Total.....	1,447

There are now under investigation 121 cases where information has been received tending to show that persons died prior to September 25, 1902.

The following table shows the status of the final rolls of Choctaws and Chickasaws June 30, 1906, taking into account all additions and eliminations:

Choctaws by blood	15,023
Choctaws by intermarriage.....	1,550
Choctaw new born (act of March 3, 1905).....	1,556
Chickasaws by blood	4,760
Chickasaws by intermarriage.....	623
Chickasaw new born (act of March 3, 1905).....	556
Choctaw freedmen	5,356
Chickasaw freedmen	4,564
Mississippi Choctaws	1,360
Total.....	35,348
* * * * *	

Page 42.

CREEKS.

Page 42.

The percentage of cases where it has seemed almost impossible to obtain reliable evidence as to the rights of applicants is greatest in the Creek Nation. This is doubtless due to the fact that there is a larger proportion of freedmen and full-blood Indians who are densely ignorant as to their ancestors, and who keep no record of such events as marriage, birth, or death, and because there are so many different dates fatal to the rights of different classes of citizens, due to the opening of the rolls from time to time. Primarily, only those persons living on April 1, 1899, were entitled to be enrolled. The Creek agreement, ratified by Congress March 3, 1901, made provision for the enrollment of children born prior to July 1, 1900, and living on that date. A supplemental agreement, ratified by Congress June 30, 1902, made similar provision for those born subsequent to July 1, 1900, and living on May 25, 1901. The act of March 3, 1905, extended the right of enrollment to children born subsequent to May 25, 1901, and prior to March 4, 1905, and who were living on the latter date, and by the act of April 26, 1906, provision was also made for the enrollment of minor children living on March 4, 1906.

As the birth rate is greater among the ignorant and irresponsible classes, the difficulty in arriving at the date of birth or death increases proportionately. * * *

Page 43.

The total number of applicants for enrollment as citizens of the Creek Nation, both Indians and freedmen, remaining to be disposed of by the Commissioner on June 30, 1906, was 2,018.

During the past fiscal year the claims of 67 persons for enrollment as citizens of the Creek Nation were presented to the Commissioner. These are, for the most part, the claims of persons alleging a right to enrollment, but where the records in charge of the Commissioner are conclusive as to the nonsubmission of an application within the time prescribed by law.

In addition to the original applications presented, hearings having been had in 137 cases, besides the testimony taken daily in the matter of the enrollment of children under the acts of March 3, 1905 and April 26, 1906. Indeed, there has been scarcely a day during the year when the rooms occupied by the Creek enrollment division were not filled with those seeking to introduce evidence in their own cases or to make application for the enrollment of children.

Decisions were rendered in 165 cases by the Commissioner disposing of the claims of 329 applicants, 124 of whom were enrolled and 205 denied. * * *

Page 53.

Creek Nation.

On June 30, 1906, the final roll of citizens and freedmen of the Creek Nation includes 17,692 names. Only 375 of these have thus far made no selection of lands, and only 220 others have incomplete allotments. However, it is likely that all of the land in the Creek Nation will be used in making allotments to all who may be finally enrolled, including the children entitled to enrollment under the act of April 26, 1906. * * *

Page 64.

Creek Nation.

Deeds covering all allotments in the Creek Nation had been issued before the beginning of this fiscal year, except where they were withheld for specific reasons and the work has been kept up with the allotment as nearly as possible.

There were prepared during the year 1,037 allotment and homestead deeds, all of which were executed by the principal chief, and 1,401 Creek allotment and homestead deeds have been approved by the Secretary of the Interior during the year.

Prior to the act of April 23, 1903, it was necessary that deeds covering the lands of deceased allottees be issued to the heirs of the deceased, and in cases where deeds had been issued before evidence of death was received it was necessary to recall them and issue new deeds to their heirs. For this reason 220 deeds were canceled during the past year and new deeds to the heirs deceased allottees issued in their stead.

* * * * *

Excerpts from Report of the Commissioner to the Five Civilized Tribes Dated at Muskogee, Ind. T., June 30, 1907.

Page 17.

Creeks.

During the year ended June 30, 1907, 864 Creek Indians and 407 Creek freedmen, a total of 1,271 persons, have been enrolled as citizens of the Creek Nation. The names of 32 Creek Indians and 20 Creek freedmen have been eliminated from the approved rolls, under departmental authority, making the total number of persons eliminated from the Creek rolls 72 Creek Indians and 30 Creek freedmen, or 102 in all.

During the year there were received applications for the enrollment of 157 Creek minor children and 123 Creek freedmen minors, under the act of Congress approved April 23, 1903. None of the applications for the enrollment of minor children under the above act had been disposed of at the beginning of the present fiscal year, and these numbers.

in addition to those received during the fiscal year ended June 30, 1905, made a total of 546 minor Creek children and 411 minor Creek freedmen children, whose applications for enrollment must be determined prior to March 4, 1907.

During the first three months of the present year enrollment parties were in the field for the purpose of procuring additional data in enrollment cases; these parties were generally successful, but they reported increased difficulty from the Snake Indians and from ignorant and irresponsible classes. Much trouble has also been caused by the fraudulent claims that have been presented, but this state of affairs has already been fully detailed in previous reports.

During the year decisions were rendered by the Commissioner denying the claims of 1,417 persons to enrollment as Creek Indians and freedmen.

* * * * *

Page 20.

Cancellation of Enrollment.

Enrollments Canceled in Accordance with Opinion of
Attorney General.

Choctaws	208
Chickasaws	19
Cherokees	9
Creek	14
Seminoles
Total	250

The following table shows the number of persons remaining on the rolls of the Five Civilized Tribes, as finally approved by the Secretary of the Interior June 30, 1907.

Persons on Roll of Five Civilized Tribes on June 30, 1907

Choctaws	18,981
Chickasaws	6,319
Choctaw freedmen.....	5,994
Chickasaw freedmen.....	4,670
Mississippi Choctaws.....	1,639

Cherokees (including Delawares and intermarried whites).....	36,874
Cherokee freedmen.....	4,924
Creek Indians.....	11,895
Creek freedmen.....	6,807
Seminole Indians.....	2,138
Seminole freedmen.....	986

Total	101,227
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Page 29.

Creek Nation.

There have been made, during the year (June 30, 1906 to June 30, 1907) 1,116 allotments, comprising 164,101.97 acres, leaving an area of 199,888.43 acres subject to allotment.

Of the 18,698 persons whose names appear upon the approved rolls of the Creek Nation, 17,702 citizens have completed their allotment selections 222 have still fractional selections to make, and 774 persons have not taken allotments. The names of 31 persons who had selected allotments and for which deeds have been recorded have been stricken from the approved rolls.

* * * * *

Excerpts from Report of the Commissioner to the Five Civilized Tribes Dated at Muskogee, Oklahoma, June 30, 1908.

Page 17.

Creek Nation.

There were 1,802 Creek allotment deeds prepared during the year. The final roll of the Creek Nation contains 18,702 names, not including 102 names which have been stricken from the approved roll, 31 of whom have had deeds issued to them and which deeds have not been canceled.

There are 30 citizens on the approved roll who have made tentative filings on lands which have heretofore been allotted

to citizens whose names have since been stricken from the approved roll.

During the year there have been 648 allotment certificates and 418 homestead certificates prepared and mailed; and 1,526 reports have been made to the Indian Agent, showing age, degree of blood, and homestead and allotment selections.

While all allotments are practically completed, there remains a large amount of detail work to be done to complete the records, which will necessarily be slow and tedious.

There still remains a considerable number of disaffected Creeks who refuse to consent to the allotment of the tribal lands, as is evidenced by there having been returned to this office, 1,131 certificates, the majority of which were undoubtedly refused by the addressee or returned after delivery.

* * * * *



No. 741.

Office Supreme Court, U. S.
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JAMES D. MAHER
CLERK

In the
Supreme Court of the United States.
October Term, 1916.

THE UNITED STATES

VERSUS

BESSIE WILDCAT, a Minor, et al.

INVOLVING THE BARNEY THLOCCO ALLOTMENT.

BRIEF ON BEHALF OF APPELLEES.

C. B. Stuart,
A. C. Cruce,
Geo. S. Ramsey,
Malcolm E. Rosser,
Edgar A. deMeules,
Villard Martin,
John Devereux,
J. E. Wyand.
K. B. Turner,
M. E. Turner,
J. B. Furry,
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P. J. Carey,
W. C. Franklin,
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William A. Collier,
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Chas. A. Moon,
Francis Stewart,
Joseph C. Stone,
Attorneys for Appellees.



In the
SUPREME COURT OF THE UNITED STATES.
October Term, 1916.

No. 741.

THE UNITED STATES

vs

BESSIE WILDCAT, a Minor, et al.

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PROPOSITION ONE.

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In the
SUPREME COURT OF THE UNITED STATES.
October Term, 1916.

No. 741.

THE UNITED STATES
vs
BESSIE WILDCAT, a Minor, et al.

BRIEF of APPELLEES.

Statement.

This is an action by the United States to set aside a patent issued in the name of Barney Thlocco, a citizen of the Creek Nation, for the benefit of his heirs. The government pleads a mistake of law, namely, that the Commission enrolled Thlocco without any evidence upon the question: Was he alive April 1, 1899, and further charges that he was in fact then dead and therefore not entitled to enroll-

ment. The defendants resisting the government deny that the enrollment was made without evidence and allege that Thlocco was enrolled upon evidence supporting the Commission's findings, and further allege that he was alive April 1, 1899. The preliminary question presented by the government's bill is: Was there any evidence to support the Commission's judgment. The trial court held that the government had no right to retry the question, Was Barney Thlocco alive April 1, 1899, without first proving that the Commission enrolled him without evidence. The government undertook to show that there was no evidence before the Commission upon the question, Was Thlocco alive April 1, 1899; but the witnesses for the complainant testified positively that there was convincing evidence upon the question before the Commission and that the Commission enrolled Thlocco upon satisfactory proof. The bill was framed on the theory that the United States must first impeach the judgment of the Commission, but after the evidence was in the government abandoned that theory. The contention now made upon behalf of the United States comes to one point: It is claimed that the government may retry the question, Was Barney Thlocco alive April 1, 1899, without impeaching the judgment of the Commission, without showing that the enrollment was made by mistake of law, no gross mistake of the facts proved or fraud being alleged.

Barney Thlocco was enrolled by the Commission to the Five Civilized Tribes May 24, 1901, and the allotment was made and the certificate therefor issued June 30, 1902. Patents were recorded in the office of the Commission to the Five Civilized Tribes, a public record, April 11, 1903, the allotment certificate and patents issued in the name of Thlocco. The defendants Bissett, Toxaway Oil Company, Moore and Cosden, claim five acres of the 160 acres involved through an attempted filing made by Jonathan R. Posey on May 19, 1913. On August 25th, 1904, the Commission transmitted to the Secretary of the Interior a communication from the Creek attorney in the nature of a motion to reopen the matter of the enrollment of Thlocco. September 16, 1904, the Secretary of the Interior ordered further investigation in the matter of Thlocco's right to enrollment, and directed that notice be given to his heirs of a hearing. An attempt was made to locate the heirs of Thlocco, but they were not found, and no notice was ever given of the proposed hearing. Some affidavits were taken tending to show that Barney Thlocco died before April 1, 1899, and upon that showing and without any notice to the heirs, on the 13th day of December, 1906, the Secretary of the Interior ordered that the name of Barney Thlocco be stricken from the rolls, finding in his order that the patents to both the surplus and homestead allotments had been is-

sued and delivered and referring the case to the Attorney General for such action as might seem to him proper. The government having failed to prove that the Commission enrolled Thlocco arbitrarily and without evidence, no evidence was offered upon the part of the defendants and decree was entered against the government. The Circuit Court of Appeals for the Eighth Circuit certified to this court three questions, as follows:

1. Should the evidence offered by the government to show that Thlocco died prior to April 1, 1899, have been admitted?
2. Should the evidence offered by the government to show that Thlocco's enrollment was cancelled by the Dawes Commission have been admitted?
3. Were the certificate of allotment and deeds to Thlocco null and void because he was dead at the time they were made?

Counsel for the government concede that question No. 3 is without merit, and therefore do not insist that the certificate of allotment and deeds to Thlocco were void because issued in his name after his death, but Bissett and others, claiming through Posey, insist that question No. 3 be answered in the affirmative. As to question No. 2 the government

only contends that the evidence showing the attempted cancellation of Thlocco's enrollment should have been admitted to show the history of the case, methods of the Commission and diligence upon the part of the government acting upon behalf of the Creek Nation; but counsel for Bissett and others insist that said attempted cancellation of Thlocco's enrollment shifted the burden of proof so as to require Thlocco's heirs to show in this case his right to enrollment. Defendants resisting the government contend that the entire proceeding to cancel was without process of law and wholly void. They say that the three questions should be answered in the negative and contend that if the judgment of the Commission enrolling Thlocco may be impeached upon any ground that an action will lie only for error of law, gross mistake of the facts proved, or for fraud, as in public land cases. No question of fraud is involved. No mistake of the facts is pleaded or attempted to be proved.

For convenience we shall herein refer to the defendants resisting the government as defendants, without reference to those who join the government in seeking to cancel the enrollment and allotment. The whole record and case have been brought to this court upon application of the defendants.

THE CERTIFICATE.

The certificate should be disregarded for errors of fact.

We challenge most respectfully the certificate as erroneous in fact, and for the further reason that the findings of fact are so mixed with questions of law that the statements therein cannot assist the court, such as that :

(a) The certificate recites (Rec., p. 199) : "No person appeared to request Thlocco's enrollment." But the enrolling clerk testified upon behalf of the government that he completed Barney Thlocco's roll or census card at the Okmulgee hearing May 24, 1901, and "that in all cases where the card was completed in every respect over there some one *must have appeared*, because those old census cards were made prior to April 1, 1899, and we didn't know whether they were living or dead." (Rec., p. 69.) On this same point Mr. Hastain testified for the government that on that occasion at Okmulgee the Town Kings and other citizens of the Creek Nation appeared before the enrolling party *constantly giving information as to the rights of citizens to be enrolled and as to whether or not they were living April 1, 1899.* (Rec., p. 87.)

(b) At page 198 of the record the certificate recites, referring to Thlocco: "His card was made out at Okmulgee on the 24th day of May, 1901 * * * to meet the requirements of sec. 28." It was supposed by the enrolling party that all citizens whose names were not enrolled before the adoption of the treaty might lose their right to enrollment. The evidence shows, as Mr. Hastain testified: "In the course of our work at Okmulgee when we had information that the name was entitled to go on the final rolls we completed the card, and if we didn't have the information or evidence we didn't complete it." (Rec., p. 85.) Merrick, the enrolling clerk, said: "I never listed any man for enrollment without some information or evidence. It was our purpose to have information from some direction before we would complete the card and if we found any Indian whom we couldn't get any information about with reference to April 1, 1899, we left that card incomplete." Continuing to the same point he testified that it was the invariable custom and practice never to complete a card until they had reliable information showing that the citizen was alive April 1, 1899, and that no man was ever enrolled or received a completed card solely because he was on the old rolls, and that they required evidence outside of the rolls before completing a card. (Rec., pp. 69-71.) Therefore Barney Thlocco was not listed for

want of information but because the Commission had before them the evidence.

(c) At page 198 the certificate recites, with reference to the old census card: "It contained the descriptive matter needed to complete Thlocco's new census card. Thlocco's new census card was therefore made out on the 24th day of May, 1901, complete as it appears in the final rolls approved by the Secretary of the Interior." It appears to us that this recital is in direct conflict with the evidence, which shows that no card was ever made complete merely by taking the information from an old card, but on the other hand proof was first heard on the question, Was the citizen alive April 1, 1899, and the completion of the card was evidence that this question had been investigated.

(d) At page 199 the recital appears: "There is no evidence in the record as to what, *if any*, investigation was made at the time Thlocco's card was made or subsequently to ascertain whether he was living on the first day of April, 1899." We respectfully insist that this finding is misleading in the use of the words "if any," which might imply that the record is silent on the question as to whether or not evidence was heard with respect to the question, Was Barney Thlocco alive April 1, 1899. Instead of this recital the court should have found expressly that

evidence was heard by the Commission to determine the question, Was Barney Thlocco alive April 1, 1899, and that from that evidence the Commission was satisfied of his right to enrollment. Merrick, the enrolling clerk, testified with reference to the enrollment of Barney Thlocco: "I was satisfied that he was living on April 1, 1899 * * * before I prepared the schedule and submitted it to Mr. Bixby. * * * We would ask Town Kings and Town Warriors when they came in and anybody else if they knew this or that." (Rec., p. 68.) And again: "I don't think I ever arbitrarily enrolled a person." (Rec., p. 70.) Mr. Hopkins, a member of the enrolling party, testified in response to the question, "Did they enroll any citizen without evidence?" "No, sir, I don't believe; in fact, I don't see how it would be possible to do it." (Rec., p. 82.) Mr. Hastain said upon the evidence showing that the roll card was completed at Okmulgee: "If that card was completed at Okmulgee it indicates that the party who wrote the card was satisfied on that date that Thlocco was living on April 1, 1899, satisfied on some form of evidence, must have been." (Rec., p. 86.) And further to the same point: "We were getting all the information we could from every source possible at that time," and in answer to the question, "They came before you almost constantly, didn't they?" he replied, "Yes, sir." In answer to the question, "And one of the particular points that

you were constantly investigating was whether or not these persons were living on April 1, 1899?" he answered in the affirmative. Mr. Bixby, the Chairman of the Commission, testified that in every case some member of the Commission, and upon evidence outside of the rolls, reached the conclusion that every enrolled Creek citizen was alive April 1, 1899, saying: "I know; I was on the job all the time and was satisfied that every name on the roll was entitled to be on the rolls."

(e) At page 199 the certificate recites: "The evidence is conclusive that the Commission throughout its dealing with his name from the time of his enrollment down to the time of issuing and recording his deeds believed him to be alive." The government does not accept this finding, but now contends that the Commission knew all this time that Thlocco was dead, and complains because the Commission treated him as alive, knowing that he was dead. Merrick, the enrolling clerk, testified: "We knew that Thlocco was dead, and we were apparently satisfied at Okmulgee that he was living April 1, 1899, but that did not preclude further investigation." The enrolling party had information as to the death of Thlocco, because Hopkins had discovered the fact of his death from some investigation on his own account and had endorsed on Thlocco's 1895 roll card the words "Died

in 1900." On this point Mr. Hopkins said that this notation meant that he had personally some information before him as to whether or not Barney Thlocco was living April 1, 1899, else he would not have made that notation. (Rec., p. 82.) He explains the fact that the certificate of allotment and patent were issued in the name of Thlocco as follows: "With reference to the patents the practice was to issue the patent in the name of the party according to the roll where no proof of death was filed by the Commission or where the heirs had not appeared and filed proof of death and claimed the right to have the deed issued to them."

(f) The certificate at page 196, and elsewhere, expresses the view that the enrollment of Thlocco was "purely administrative," but the Commission acted judicially and so understood their work. See pages 6 and 7, Annual Report of the Commission to the Five Civilized Tribes to the Secretary of the Interior, filed October 3, 1898, where the Commission said, referring to the work of enrollment and Acts of Congress relating thereto: "This compels the Commission to pass judicial judgment upon the right to citizenship of every name upon the citizenship roll of each of the Five Tribes. No clerk or other substitute can do this work. It must be done personally by the Commission and upon a hearing of evidence

in each case where there is any question." The letter of transmission in the case of Barney Thlocco and others to the Secretary of the Interior for the approval of the work of the Commission recites that the Commission had examined the evidence as to Barney Thlocco's right to enrollment. The enrollment therefore was the *quasi*-judicial act of the Commission. We show under Proposition I, paragraph J, that the conclusion of the Honorable Judges that this work was administrative merely and not *quasi*-judicial is in open conflict with the decisions of this court. The finding that the enrollment of Thlocco was administrative merely is an erroneous conclusion of law instead of a finding of fact.

(g) At page 194 the certificate says that the deeds were never delivered. But the Secretary of the Interior found that they had been issued and had been delivered prior to December 13, 1906. (Rec., p. 61.)

(h) At page 194 the certificate finds that a rehearing was granted and was had in the matter of the enrollment of Barney Thlocco. But there was no rehearing, because there could be none without notice to the heirs. The record affirmatively shows that no notice was given to the heirs (Rec., p. 60) which important fact is omitted from the certificate.

(i) In the certificate, page 197, it is said:

“ Section 4 of the Original Creek Agreement by express provision permitted selections of allotments for minors to be made by the head of the family or by their guardian. Thus by implication it forbade the selection of allotments for adults to be made otherwise than by the citizen in person.”

The court evidently overlooked the following language which occurs in the same section:

“ And if for any reason such selection be not made for any citizen, it shall be the duty of said Commission to make selection for him.”

Under Proposition III, sub-head A (3), we show that arbitrary allotments were required by law in such cases.

(j) At page 199 the certificate recites, with reference to the census card of Thlocco: “That card being complete, his name would in the regular practice of the Commission be transferred to the final rolls unless some reason was brought to the notice of the Commission or its clerical force showing that the name ought not to be transferred to the final roll.” But this card was the final roll as far as Thlocco was concerned. This card in itself constituted a part of the final rolls without transfer, but the really important error in this statement is the implication that in regular course the card would become final without

any further investigation unless Thlocco's right to enrollment was challenged, whereas the evidence shows, as was testified to by Merrick: "I would have to say that after Thlocco's name was listed on the card at Okmulgee on May 24, 1901, there was some further investigation upon the question as to whether or not he was living or dead on April 1, 1899." (Rec., p. 68.) And again: "There evidently was some further investigation." (Rec., p. 69.) On this point Mr. Hopkins testified: "The Commission following that meeting at Okmulgee commenced in August thereafter and continually carried on investigation for evidence as regards each name." (Rec., p. 81.) Mr. Bixby, the chairman of the Commission, said: "I have no doubt but what we would subsequently conduct an investigation as to those whose census cards were incomplete or as to particular ones whom we then listed as unaccounted for not only as to them only, but we investigated all the time everybody that there was any doubt about." The evidence shows that in the case of incomplete cards the Commission made an original investigation after the Okmulgee hearing; that in the case of completed cards, like that of Thlocco, they continued their investigation and verified their belief that those whose names were on the completed cards were entitled to enrollment. Thlocco was accounted for at Okmulgee, and subsequent investigation followed, as in all similar cases.

The history of this case is so difficult, we beg to express the view that the errors of fact here complained of are most pardonable.

The EVIDENCE.

The testimony showing how Thlocco was enrolled appears by the following witnesses:

Edward Merrick, the enrolling clerk.	66, 73, 89
Philip B. Hopkins.	76
E. Hastain.	85
John G. Lieber.	89
Tams Bixby.	94

EDWARD MERRICK testified, in part, as follows: That as enrolling clerk for the Commission he was in attendance with the enrolling party at Okmulgee in May, 1901. That he and Mr. Hastain did the most of the work of listing Creek citizens on the census cards for enrollment. That the enrolling party went to Okmulgee to investigate those whose names were on the 1890 and 1895 tribal rolls not theretofore accounted for. That the United States Marshal and his force went with the enrolling party to help bring in the Indians and procure the evidence as to the right of the unaccounted for members to enrollment. That a great many Indians were brought in, many

wagons and teams being used all over the country. That he listed the name of Barney Thlocco for enrollment on the 24th of May, 1901. That in cases where no appearance was made by or upon behalf of those whose names were on the tribal rolls they listed the names taking the information from the old tribal rolls; that in the case of Thlocco he couldn't say whether the initiative or first act in writing his regular census card was done by taking his name from the old card or the tribal roll, or whether some one appeared and asked for his enrollment. That in the case of Thlocco the card was completed, which meant that there was at Okmulgee on that occasion an investigation upon the question, Was he alive April 1, 1899, because that was a known prerequisite to the right of enrollment. Some cards were not completed that day in cases where the Commission was not satisfied of the right of the members to enrollment. That though they were satisfied at Okmulgee upon evidence that Barney Thlocco was living April 1, 1899, that did not preclude further investigation. That the Commission continued, after the enrolling party returned to Muskogee, to investigate the right of enrollment of all the persons whose names appeared on the cards made at Okmulgee; that that was the practice of the Commission. While the Commission was at Okmulgee seeking information for the unaccounted for Creeks, the Town Kings and Town

Warriors of the Creek Nation, who constituted the legislative branch of the government, were in session, and that the members of the council were continually going before the Commission and the enrolling clerks giving information as to whether members on the tribal rolls were living April 1, 1899, and as to their right of enrollment; that considering that Barney Thlocco's card was completed at the Okmulgee hearing he would have to say that some one must have appeared and given information as to his right to be enrolled, and that he would have to further say that following that, that there was further investigation upon the question, Was he living April 1, 1899. He said: "I never listed any man for enrollment without some information or evidence. It was our practice to have information from some direction before we would complete the card, and if we found an Indian whom we couldn't get information about with reference to April 1, 1899, we left his card incomplete." That it was their invariable custom and practice never to fill out and complete a card until they had information with respect to the question, Was he living or dead April 1, 1899. That he never enrolled any Indian arbitrarily. That he never listed any man for final enrollment solely because he was on the tribal rolls. That he required separate evidence outside of the rolls before he completed a card. That a notation on the 1895 pay roll made by

Philip B. Hopkins with reference to Barney Thlocco "Died in 1900" called his attention as enrolling clerk to the fact that Barney Thlocco was dead at the time of his enrollment. That his explanation of the fact that the final census card of Barney Thlocco does not show his death is, that there was no regular affidavit filed showing when he died, that is, proof of the date of the death. That in view of the fact that the age on the old census card is given as 40, and the new as 35, and the post-office is different, he knows that information was given him at Okmulgee. That when Thlocco and those of his class were listed for enrollment the clerks would go before Mr. Bixby, the chairman of the Commission, and go over every one of them, the chairman considering the cards and all the data furnished by the enrolling clerks before forwarding the rolls to Washington for the approval of the Secretary.

This witness said: "I repeat, and say that the Commission must have been satisfied that Thlocco was living on April 1, 1899, or the name would not have been submitted. We had information that we thought we could rely on that the person was living on April 1, 1899."

PHILIP B. HOPKINS testified that he was the chief attorney and chief clerk of the Commission and was in the enrolling party at Okmulgee. That prac-

tically the entire force interested in the Creek enrollment work was in that party. That representatives of the Creek Nation were present and the Creek attorney and that the Town Kings were present at that meeting and all endeavored to get all the information they could. That the United States Marshal and his force and field forces were constantly bringing in people. That the notation on 1895 tribal roll opposite the name of Barney Thlocco "Died in 1900" was in his handwriting; that evidently somebody gave him that information upon inquiry about Barney Thlocco. That it was intended that when the Commission came to pass on that name for final record on the roll that inquiry should be made as to when Thlocco died. That "The Commission following that meeting at Okmulgee commenced in August thereafter and continually carried on an investigation for evidence as regards each name." That there were field parties out, and that ultimately, before any tentative enrollments were sent to the Secretary to become final the Commission was satisfied on evidence that the names of the persons enrolled were entitled to enrollment; that no person was enrolled without evidence, that in fact he could not see how that could be possible, the practice of the Commission considered. That the Creek Commission and the Creek Attorney may have vouched for the party, they being present at the time to protect the tribe. That with

reference to patents the practice was to issue the patent in the name of the enrolled party unless a death affidavit was filed. That the Commission had to be satisfied. That the Commission never passed upon a card until it was completed. That the information as to a member's right to enrollment may have been picked up by piecemeal, but the practice was that the Commission must be satisfied upon evidence in every case.

E. HASTAIN, an enrolling clerk present at the Okmulgee hearing, testified substantially as Mr. Merrick, saying that when they had information that a name was entitled to go on the final rolls they completed the final roll at Okmulgee; that if they didn't have this information they didn't complete it. That Barney Thlocco's card having been completed at Okmulgee indicated that the party who wrote the card was satisfied on that date that Thlocco was living on April 1, 1899, and satisfied from evidence. That there were two classes of cases at the Okmulgee meeting: one where they were satisfied on evidence and completed the cards, and the other where the cards were left incomplete and where they were not satisfied. That so far as his knowledge went there was in all cases some evidence upon the point as to whether the citizen was living or dead on April 1, 1899, before the rolls were recommended to the Secretary

for approval, and that that was the departmental practice. That as the Commission was at work enrolling citizens at Okmulgee on the 24th day of May, 1901, and at other times while they were there, persons were continually going before the chairman of the Commission and the enrolling clerks giving information as to whether or not persons on the tribal rolls were living April 1, 1899.

JOHN G. LIEBER, contest attorney, who sometimes acted as enrolling clerk, testified that the notation on the 1895 roll "Died in 1900" meant that the clerk making the enrollment should be on his guard and make inquiry; it meant that somebody had furnished information that the party was dead and put the Commission on their guard and suggested further inquiry and investigation. That during the last two days at Okmulgee, May 24th and 25th, the Town Kings were at the council and were in the office where the enrolling was being done, and were giving all the information they knew about the Indians theretofore unaccounted for; that the Creek Attorney was there and that according to his recollection the Creek Commission was there.

TAMS BIXBY, Chairman of the Commission, the only living member of the Commission as it existed in 1901, testified that before the roll or census

card was released as final he would get the men together and go over the list; that he went over the list at different times, sometimes with one clerk and sometimes with another; that he would get the clerk that made a particular card and go over it, and before that card became final he satisfied himself that the man was entitled to enrollment. That he did not, so far as he knew, ever enroll any man without taking some evidence or acquiring some knowledge other than from the tribal rolls that he was entitled to enrollment, and that he never permitted it to be done. That his purpose was to find out whether a Creek who had died was living April 1, 1899; that he always ascertained that fact before he enrolled him; that he satisfied his mind on that subject by evidence outside of the rolls; that every name sent to the Secretary for approval had been investigated by some member of the Commission. That he was on the job all the time and that he was satisfied that every name on the rolls was entitled to be there. That he had no doubt but that investigation subsequent to the Okmulgee hearing was conducted not only as to those whose cards were incomplete but as to those who were completed also where there was any question. The field parties were sent out by the Commission to bring in evidence. That frequently the Commission had only a memorandum to go by, and frequently it was made by full-blood Indians who could not write English.

That frequently information was reported to the clerks and frequently to the Commissioners themselves. He further testified that he thought he examined every card in the Creek Nation himself personally, probably more than once; that this examination took place in the office at Muskogee after the card was made. That they made a list of the names that were questioned and sent field parties out after them to see if they were living or dead on April 1, 1899. That when he examined a card he would have with him the clerk who made the schedule. He testified: "When I took the card I went over it several times with the clerks and would find out from the clerk all the information that he had with reference to that card several times. I expect I have talked with the clerks about every card more than once." This witness by various forms of expression testified that in every case the Commission was satisfied upon the evidence that each enrolled citizen of the Creek tribe was entitled to enrollment and that he was alive April 1, 1899, and by evidence he stated that he meant something outside of and beyond the tribal rolls and old census cards. *that thousands were enrolled "name" Phoebe. R. 99*

We insist that there appear upon behalf of the government many somewhat erroneous statements of fact, made inadvertently, of course. We pray for a careful examination of the entire evidence in the

record which constitutes the summary made upon behalf of the government, from which it will appear that Barney Thlocco was regularly enrolled, not arbitrarily but upon evidence, just as thousands of others. It will appear from an examination of this evidence and from the reports of the Commission to the Five Civilized Tribes that if the enrollment of Barney Thlocco is subject to impeachment because of the manner in which he was enrolled, practically all other Indians in the Five Civilized Tribes are in the same situation.

Both Merriek and Lieber testified that the enrolling party heard much evidence on May 24, 1901, the day Thlocco was enrolled.

The testimony is in accord with the reports of the Commission such as in the Tenth Report at page 29 it is said:

“ The nearer the work approaches completion the greater the degree of care required in determining the rights of applicants for enrollment. When it is considered that no person who died prior to April 1, 1899; no child born subsequent to April 1, 1899, who died prior to July 1, 1900; no child born subsequent to July 1, 1900, who died prior to May 25, 1901; and no child who died subsequent to May 25, 1901, is entitled to enrollment, it will readily be seen that in cases of this character, where the question of date

arises, the evidence must be clear and convincing. The longer the period of time which has elapsed since the birth or death of the applicant, as the case may be, the greater the difficulty encountered in obtaining sufficient proof upon which to predicate judgment. Many of those for whom applications have been made have been clearly shown, upon examination of the witnesses under oath, not to be entitled to enrollment, and in some cases the testimony has been so overwhelmingly against enrollment that the applications have been withdrawn by the persons who made them." (Italics ours.)

Erroneous Statements of Fact in the Government's Brief.

We respectfully challenge as incorrect various statements of fact in the government's brief, such as that:

(1) It is recited with reference to the enrollment of Thlocco "Investigation ceased about May 22nd or 23rd." He was listed for enrollment May 24th. This statement, if true, would preclude the possibility of investigation having been made on the 24th. Counsel for the government cite the testimony of John G. Lieber in support of this statement. But this same witness testified: "*The last two days (May 23 and 24) at Okmulgee the Town Kings were at the Council and were in our office frequently, as*

were also different men from the different towns, giving information as to what they knew about these Indians. I think the Creek Attorney at that time was S. B. Dawes. I can't say whether he was there. In those days the Creek Nation had a Commission that attended to those enrollments, I judge it was there." The persons above named were giving information, therefore, on May 24th. (Rec., p. 93.) The testimony of Merrick, the enrolling clerk, is to the same effect. He said: "On the last three or four days before May 25, 1901, people, the Town Kings, the Town Warriors, or prominent Creeks, would appear in behalf of others and ask to have certain persons listed. * * * I would think that in all cases where the card was completed in every respect over there that some one must have appeared. I never listed any man for enrollment without some information or evidence." (Rec., p. 69.) See also record, pages 67, 70, 71 and 75.

(2) It is stated, referring to the last days of enrollment at Okmulgee: "At this time, however, all rules of practice were abandoned." We most earnestly insist that the record does not support this statement. While it is true that the Commission was making more strenuous efforts than theretofore to procure evidence and to complete the enrollment, the only difference between the practice on that oc-

casion and theretofore came to two points: *First*, the Commission did not require personal application but took the initiative and enrolled members without application upon evidence when satisfied that they were entitled thereto; *second*, persons whose names were on the tribal rolls were tentatively listed for subsequent investigation, receiving incomplete cards where the Commission was not satisfied upon proper evidence that they were entitled to enrollment. The evidence shows that in all cases where the roll cards were left incomplete for want of convincing evidence, there was a subsequent investigation so that said subsequent investigation brought that class of citizens within the regular rules excepting, only, on the point that they did not personally apply for the enrollment. Where the cards were completed upon evidence showing that the member was entitled to enrollment, there was always a subsequent investigation if there was any question about it. Whether the cards were complete or incomplete before they were forwarded to the Secretary for approval the procedure was the same as that in all the tribes and in all other uncontested cases, excepting, only, that the Commission in some cases at Okmulgee took the initiative and enrolled without personal application.

(3) It is stated that the Commission "were often imposed upon," implying, we understand, that

the Commission was often imposed upon only as to the citizens enrolled at Okmulgee. But the evidence shows that the witnesses were directing their testimony to the whole scheme of enrollment applicable to all the members of the Five Tribes and for all the enrollment period.

(4) The statement is made that on May 24, 1901, at Okmulgee citizens were arbitrarily enrolled upon whatever evidence was available. But the evidence shows *that no citizen was ever arbitrarily enrolled*, the enrolling clerk Merriek testifying positively that he never arbitrarily enrolled any citizen. The Chairman of the Commission testified to the same effect.

(5) It is stated that the evidence shows that the Commission took the judgment of the clerks on the roll cards. While such a statement appears in the testimony of one witness, it is modified and explained at pages 74, 85, 100, and elsewhere in the record, where it appears that some one of the Commissioners in every case made a personal investigation and had a conference with the enrolling clerk and reviewed the memoranda, evidence or reports of the enrolling clerks, and that the Commission as such was satisfied in each case, either upon the evidence heard before the Commission or reported to the Commission. The Chairman of the Commission himself was

Okmulgee when Thlocco was enrolled, and it appears from the evidence that he was making a personal investigation. Thlocco may have been enrolled on evidence heard personally by the Chairman of the Commission and reported by him to the Commission as a body and passed upon and approved by them.

(6) Counsel for the government state in reviewing the evidence: "There was no subsequent determination as to whether Thlocco was living on April 1, 1899. If there had been that fact would have appeared on the census card, or if sworn testimony had been taken it would have been transcribed and preserved." We respectfully suggest that counsel has misunderstood the evidence with reference to affidavits usually taken in cases where the citizen is dead. The clerk who enrolled Thlocco testified: "I would have to say that after Thlocco's name was entered on the card at Okmulgee on May 24, 1901, there was some investigation upon the question as to whether or not he was living or dead on April 1, 1899." The Chairman of the Commission testified that he personally went over all the matters of enrollment considered at Okmulgee and determined before the cards were sent to the Secretary for approval that the evidence was satisfactory.

**Erroneous Statements of Fact in the Brief Upon Be-
half of Bissett and Others.**

The brief upon behalf of Bissett and others contains many misstatements of fact which we are pleased to concede were made by inadvertence or for want of familiarity with the record. Considering the fact that the evidence is not voluminous, we invite an examination of all the evidence. Having heretofore stated, in substance, the evidence showing that Barney Thlocco was regularly enrolled, we do not deem it necessary to point out in detail the errors in the Bissett brief.

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PROPOSITION ONE.

THE COMMISSION TO THE FIVE CIVILIZED TRIBES WAS A SPECIAL TRIBUNAL VESTED WITH JURISDICTION AND POWER TO HEAR AND DETERMINE THE CLAIMS OF ALL PERSONS OF THE FIVE CIVILIZED TRIBES FOR CITIZENSHIP, AND ITS ENROLLMENT OF BARNEY THLOCCO AS A CITIZEN OF THE CREEK NATION CONSTITUTES ITS JUDGMENT IN THAT MATTER, AND THIS JUDGMENT IS CONCLUSIVE OF THE FACT THAT BARNEY THLOCCO WAS A CITIZEN ON APRIL 1, 1899, AND ENTITLED TO ENROLLMENT, SINCE THE CONSIDERATION AND DECISION OF THAT QUESTION WAS INDETERMINABLE TO THE DETERMINATION OF BARNEY THLOCCO'S RIGHT TO CITIZENSHIP.

We shall discuss this principal proposition involved in the case under the following heads in the order named:

4. The tribal rolls made by the Dawes Commission approved by the Secretary of the Interior and made final by Acts of Congress and are not subject to impeachment. But if subject to attack they may be impeached only for mistake of law or a gross mistake of the facts proved or for fraud, as in public

land cases. First undertaking to show that after March 4, 1907, the rolls were not subject to impeachment upon any ground, we shall then assume, for the purposes of further argument, that they may be impeached as in public land cases.

B. The jurisdictional point involved is this: Did the Commission have power to deal with the question, Was Barney Thlocco alive April 1, 1899, to hear the particular facts relating to this question, and to determine whether or not the facts were sufficient to invoke the exercise of that power? The test of its jurisdiction is whether the Commission had power to enter upon the inquiry, not whether its conclusion in the course of it is right or wrong. It was by the exercise of precisely the same jurisdiction or power that the Commission struck some names from the Creek tribal rolls because they died before April 1, 1899, and enrolled others because they were found to be alive on that date.

The authorities cited by the government on the question of jurisdiction examined. A finding if any by the Commission that a dead man was alive is not analogous to an adjudication in an administration matter that a living man is dead.

C. The authority and jurisdiction of the Commission to the Five Civilized Tribes as defined by the authorities.

D. The complainant pleaded and attempted to prove only a mistake of law. No mistake of fact was alleged or proved; nor is there any issue of fraud involved.

E. If the finding of the Commission was based upon any evidence, the action of the Commission enrolling Thlocco is conclusive. The courts cannot inquire into the extent of investigation made by the Commission. The enrollment of Thlocco is a determination or judgment not only that he had the right to be enrolled, but that he was enrolled in the manner required by law. The trial court held properly that the government must prove first of all that there was no evidence before the Commission before a retrial of the issue passed upon by the Commission. The trial court's opinion on the evidence set forth.

F. In absence of the evidence adduced before the Commission the courts will presume that there was legal, competent and relevant evidence to support each finding of the Commission.

G. The burden is upon the complainant, however difficult the undertaking, to prove a negative, namely, that there was no evidence before the Commission upon the question, Was Barney Thlocco alive April 1, 1899. It must be admitted that the evidence upon behalf of the government does not even tend to show that Thlocco was enrolled without evidence.

H. The judgment of the Commission may be rebutted only by full, clear, convincing and unambiguous proof that there was no evidence before the Commission to sustain its finding.

I. The jurisdiction of the Commission was analogous to the jurisdiction of the land department of the government in land cases, but the Commission's findings more nearly approached the dignity, sanctity and conclusiveness of a court decree.

J. The Commission was authorized "to detail clerks to aid in the performance of their duties" and "to use every fair and reasonable means within their reach" for the purpose of making the final rolls. If the Commission had enrolled Thlocco upon evidence heard by a clerk the enrollment nevertheless would have been *quasi*-judicial and not merely administrative. But the Commission as a body "thoroughly examined the evidence" and from the evidence enrolled Thlocco.

K. The Creek Nation was represented by an attorney and by head men of the tribe at the time of Thlocco's enrollment. If the hearing was *ex parte* it was such only as to the heirs and not as to the government or the Creek Nation.

L. To sustain the government would be to destroy rules of property established by the uniform

sions of the Circuit Court of Appeals for the
fifth Circuit extending over a period of seventeen
years, to destroy utterly many land titles in the hands
of innocent purchasers, and to cloud hopelessly many
thousands of titles without so much as a forum, ex-
cept at the will of the government as complainant, to
test their validity.

M. The government asks for the establishment
of a new rule which would permit the United States
a court of equity to retry a question of fact al-
ready passed upon by a land department of the gov-
ernment without first impeaching the finding of the
department upon one of the recognized grounds of
reversal, namely, for error of law, gross mistake of
fact, or for fraud.

N. The hearing in the case of Thlocco was ex-
actly the same as in all other uncontested cases.
Thlocco was "accounted for" at a hearing at Okmul-
gee, the capital of the Creek Nation, though subse-
quent investigation was made to verify the conclu-
sion reached at the Okmulgee hearing. The presump-
tion of continued life considered. The high points
of the government's testimony showing that Thlocco
enrolled regularly, restated.

A .

The tribal rolls made by the Daves Commission approved by the Secretary of the Interior were made final by Acts of Congress and are not subject to impeachment. But if subject to attack they may be impeached only for mistake of law or a gross mistake of the facts proved, or for fraud, as in public land cases. First undertaking to show that after March 4, 1907, the rolls were not subject to impeachment upon any ground, we shall then assume, for the purposes of further argument, that they may be impeached as in public land cases.

Prior to the time when the government undertook to break up the tribal relations and to partition the tribal property, the Five Civilized Tribes exercised the right to enroll their members. The various old rolls of the tribes were made up under the direction and supervision of the tribal councils. No applicant for citizenship in either of the five tribes had the privilege of going into court prior to the legislation by Congress hereinafter referred to for the purpose of establishing his right to enrollment, and no one so much as thought of resorting to a court to prevent the enrollment of anyone claiming to be a member of the tribe. Those who are familiar with the history of the Indian Territory are familiar with the custom that obtained for many years prior to 1896 of lobbying through the tribal councils the claims

of those seeking citizenship in the tribes. This right in the tribal legislative bodies to pass upon all questions of citizenship existed until the Act of June 10, 1896. In *Wallace v. Adams*, 143 Fed. 716, 723, the court said:

“ The United States by its superior might took from the Choctaw and Chickasaw Nations the power to determine who their citizens should be, which had been repeatedly guaranteed to them by treaties, and authorized the Dawes Commission and the United States Court in the Indian Territory to decide this issue, by the Act of June 10, 1896. Here is the origin of every right of the defendant involved in this action. The maintenance by him of any claim in any court necessarily concedes the power of the legislative department of the government to create or to revive, and to enforce his demand for citizenship, because without that concession, the provisions of the Act of June 10, 1896, in this regard are void, and the defendant's claim is conclusively adjudged to be baseless by its rejection by the Choctaw Nation. But, if the legislative department of the United States had the constitutional power to create or to revive the defendant's claim and to enforce it, it necessarily had the same power to determine whether or not it would revive or enforce it and to select its own method of deciding these questions. It might have determined this issue itself and have declared by direct enactment that the defendant Hill was a citizen of the Choctaw Nation. It

might have empowered a committee, an Indian agent, a commission, a board, or a court to examine and determine that question on its behalf, and as the determination of this question of citizenship was a purely legislative and administrative function, and not a judicial one, Congress necessarily had the authority under the Constitution at any time before an allotment of land under its previous acts had been finally made to the defendant, and his right to the land had thereby become vested, to repeal its previous legislation, to change its method of determining the issue, to strike down any decision that had been made under its previous acts, to prescribe a new method of deciding the question, or to refuse to determine it altogether and leave the claim of the defendant as it found it, conclusively barred by its rejection by the Choctaw Nation."

The Act of June 10, 1896 (29 Stat. 321), provided for the continuance of the Commission to the Five Civilized Tribes, and further provides :

" Said Commission is directed to continue the exercise of the authority already conferred upon them by law and endeavor to accomplish the objects heretofore prescribed to them and report from time to time to Congress.

" That said Commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said na-

tions and after such hearing they shall determine the right of such applicant to be so admitted and enrolled :

“ *Provided, however,* That such application shall be made to such Commissioners within three months after the passage of this act.

“ The said Commission shall decide all such applications within ninety days after the same shall be made.

“ That in determining all such applications said Commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes :

“ *And provided, further,* That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

“ In the performance of such duties said Commission shall have power and authority to administer oaths, to issue process for and compel

the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of said territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes:

“ *Provided*, That if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the Commission provided for in this act, it or he may appeal from such decision to the United States District Court.

“ *Provided, however*, That the appeal shall be taken within sixty days, and the judgment of the court shall be final.

“ That the said Commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States Courts, as provided herein.

“ The Commission is hereby required to file the lists of members as they finally approve them

with the Commissioner of Indian Affairs to remain there for use as the final judgment of the duly constituted authorities.

“ And said Commission shall also make a roll of freedmen entitled to citizenship in said tribes and shall include their names in the lists of members to be filed with the Commissioner of Indian Affairs.”

This act gave the United States District Court appellate jurisdiction over the decisions of the Commission. A great number of appeals were taken under this provision especially in the Choctaw and Chickasaw Nations. The United States Court held that it should try these cases *de novo* upon appeal and hear not only the evidence that was introduced before the Commission but any other evidence that might be offered upon the part of every applicant for enrollment by the different nations. The applicants, of course, were vigilant and active in procuring testimony and were represented by counsel who pressed each individual case, while the nations were represented by one or two men who had charge of all the cases upon the part of the nations and who were not very active in their opposition of the enrollment of these applicants. The result was that a very large number of applicants, who had been rejected by the Commission were placed on the rolls by the court. Thereupon the different tribes formed the opinion

that the courts were against them in the enrollment of citizens and it was the general belief in the Indian Territory that a large number of people had procured many of the judgments of the courts enrolling individuals by fraud and perjured testimony. This statement is made without any purpose or intention of reflecting upon the courts who rendered these judgments. These courts were as honorable and able as any courts in the country, but at that time people were not well acquainted in the Indian Territory, and the courts knew little about the character of the witnesses testifying, and there was not sufficient activity upon the part of the tribes to produce evidence which would have disclosed the fraud and perjury of the applicants for enrollment.

These conditions brought discredit upon the entire fraternity of court citizens. In fact, so much so that in the Choctaw and Chickasaw Nations, the Supplemental Agreement of 1902 provided a means by which the right of these court citizens to enrollment could be, and was, again contested, and a large number of them stricken from the rolls notwithstanding their claim that the judgment of the United States Court in the Indian Territory was final and could not be attacked. In fact, a number of those stricken were Indians and as much entitled to enrollment as hundreds and thousands of others whose enrollment was never questioned.

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When the Act of June 28th, 1898 (30 Stat. 495), passed the prejudice against the courts arising from the conditions just described, was very strong in the minds of the people in power in the various States, and it was also strong in the minds of the members of the Five Civilized Tribes and in the War Department, and it was in view of these conditions that the Act of June 28th, 1898, was passed. The various treaties subsequent to that time, were in accordance with Section 21 of the Act of June 28, 1898, pro-

That in making rolls of citizenship of the various tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens as of the year eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding Acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said rolls to persons whose names are found thereon; and all who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other roll and omit all such as may have been placed thereon by fraud or without authority of

law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, and with such intermarried white persons as may be entitled to citizenship under Cherokee laws.

“ It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six.

“ Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and laws of said tribes.

“ Said Commission shall have authority to determine the identity of Choctaw Indians claiming rights in the Choctaw lands under article fourteen of the treaty between the United States and the Choctaw Nation concluded September twenty-seventh, eighteen hundred and thirty, and to that end they may administer oaths, examine witnesses, and perform all other acts necessary thereto and make report to the Secretary of the Interior.

“ The roll of Creek freedmen made by H. W. Dunn, under authority of the United States,

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to March fourteenth, eighteen hundred and seven, is hereby confirmed, and said commission is directed to enroll all persons now living whose names are found on said rolls, and all descendants born since the date of said roll to persons whose names are found thereon, with other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek Nation.

It shall make a correct roll of all Choctaw men entitled to citizenship under the treaties and laws of the Choctaw Nation, and all descendants born to them since the date of treaty.

It shall make a correct roll of Chickasaw men entitled to any rights or benefits under the treaty made in eighteen hundred and six between the United States and the Choctaw and Chickasaw tribes and their descendants to them since the date of said treaty and acres of land, including their present residences and improvements, shall be allotted to them to be selected, held, and used by them until their rights under said treaty shall be determined in such manner as shall be hereafter provided by Congress.

The several tribes may, by agreement, determine the rights of persons who for any reason may claim citizenship in two or more tribes, as to allotment of lands and distribution of lands belonging to each tribe; but if no such agreement be made, then such claimant shall be entitled to such rights in one tribe only, and may

elect in which tribe he will take such right; but if he fail or refuse to make such selection in due time, he shall be enrolled in the tribe with whom he has resided, and there be given such allotment and distributions, and not elsewhere.

“ No person shall be enrolled who has not heretofore removed to and in good faith settled in the nation in which he claims citizenship:

“ *Provided, however,* That nothing contained in this act shall be so construed as to militate against any rights or privileges which the Mississippi Choctaws may have under the laws of or treaties with the United States.

“ Said Commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes, and the United States Court in Indian Territory shall have jurisdiction to compel the officers of the tribal governments and custodians of such rolls and records to deliver same to said Commission, and on their refusal or failure to do so to punish them as for contempt; as also to require all citizens of said tribes, and persons who should be so enrolled, to appear before said Commission for enrollment, at such times and places as may be fixed by said Commission, and to enforce obedience of all others concerned, so far as the same may be necessary, to enable said Commission to make

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rolls as herein required, and to punish anyone who may in any manner or by any means obstruct said work.

The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to local laws, shall alone constitute the several tribes which they represent.

The members of said Commission shall, in performing all duties required of them by law, have authority to administer oaths, examine witnesses, and send for persons and papers and any person who shall wilfully and knowingly make any false affidavit, or oath to any material fact in any matter before any other officer authorized to administer oaths, to any affidavit or other paper to be filed or oath taken before said Commission, shall be deemed guilty of perjury, and on conviction thereof shall be punished as for such offense."

It will be seen that the first paragraph of section 1 of the above act gives to the Commission to the Civilized Tribes authority to strike from the rolls the names of all persons placed thereon with or without authority of law. This section repeats upon this proposition and provides that the Commission is authorized and directed to correct rolls of the citizens by blood of all the

other tribes eliminating therefrom "such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made."

This section further provides:

" Said Commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes, and the United States Court in Indian Territory shall have jurisdiction to compel the officers of the tribal government and custodians of such rolls and records to deliver same to said Commission, and on their refusal or failure to do so to punish them as for contempt; as also to require all citizens of said tribes, and persons who should be so enrolled, to appear before said Commission for enrollment, at such times and places as may be fixed by said Commission, and to enforce obedience of all others concerned, so far as the same may be necessary to enable said Commission to make rolls as herein required, and to punish anyone who may in any manner or by any means obstruct said work."

This section further provides that:

“ The members of said Commission shall, in performing all duties required of them by law, have authority to administer oaths, examine witnesses, and send for persons and papers and any person who shall wilfully and knowingly make any false affidavit or oath to any material fact or matter before any member of said Commission, or before any other officer authorized to administer oaths, to any affidavit or other paper to be filed or oath taken before said Commission, shall be deemed guilty of perjury, and on conviction thereof shall be punished as for such offense.”

A consideration of these provisions of the section just quoted, indicates clearly that the Commission was vested with much more power than is usually conferred upon such bodies. It was required to make the rolls; it was required to make correct rolls and it was given the authority, where necessary to correct the rolls, to strike names from old rolls that had been placed thereon by fraud or without authority of law. In other words, it was given full judicial jurisdiction and it was given all the means to inquire into these facts that any court would have.

In making these rolls, the Commission was the superior. It was the purpose of the government to conduct a census of the different tribes so that the lands

could be allotted. It has been considered that the division of the property to the different tribes was in the nature of a partition and that prior to the partition, the members held an interest in the property in the nature of a coparcenary interest.

See *Shulthis v. McDougal*, 170 Fed. 529.

In order to ascertain who were the coparceners or people entitled to share in this estate, it was necessary to take a census. *It was the government who was the moving party in making the allotments in the Indian Territory and in order to make the allotments the government had to find out who the members were and the government was the actor in the whole matter.* But it must be remembered that while the Government of the United States was the active agency to ascertain the facts upon which the enrollment judgment should be predicated, it performed this work through the Dawes Commission, a judicial body created and selected under solemn compact between the United States Government and the Creek people. (See SANBORN'S opinion, *Folk v. United States*, 233 Fed., bottom page 192.)

If a person goes into court, brings his suit, sends out and gets his witnesses, and upon the suit brought by him where he brings his own witnesses, a judgment is rendered, he cannot attack that judgment.

In enrolling the members of the tribe, the government designated the procedure, furnished the tribunal, regulated the introduction of evidence and had full power and authority to investigate all matters of fraud or illegality. The Commission as a special tribunal was ordered and directed to do this.

Remembering then, the conditions under which this act was passed and the fact that the courts in the Indian Territory were being criticized because of their action in admitting the so-called "court citizens," and remembering too, the duties imposed upon the Commission and the authority vested in the Commission with reference to enrollment, let us read this portion of section 21 of the Act of 1898:

"The rolls so made, when approved by the Secretary of the Interior, *shall be final*, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

The Original Creek Agreement, Act of March 1, 1901 (31 Stat. 861), provides in section 28, as follows:

"No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.

“ All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled ‘An Act for the protection of the people of the Indian Territory, and for other purposes,’ shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and moneys to which he would be entitled, if living, shall descend to his heirs, according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

“ All children born to citizens so entitled to enrollment up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said Commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

“ The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons.”

The Indian Appropriation Bill of March 3, 1901 (31 Stat. 1058, 1077), provides:

“ The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent.”

The continual use of the word “final” in these statutes is very significant. It may be argued that because the Act of 1896 gave the right of appeal from the Commission to the court that the use of the word “final” was meant merely to indicate that there should be no appeal as a matter of course or right. But this argument is not sound. There is never any appeal as a matter of right from a commission or other *quasi*-judicial body unless specially authorized by statute. The judgment or finding of the Commission would have been final in the sense that there would have been no appeal therefrom to the courts, without the use of the word “final.” The word “final” was used in this statute to indicate that the matter could go no further, that the judgment of the Commission was binding and that it was not reviewable. If it meant less than this, it was not necessary. A judgment of any court having jurisdiction of the subject matter is final until appealed from, and nobody would question its finality in that sense.

The word "final" as used in these various statutes mean conclusive or something that will irrevocably fix the rights of the parties. That this is true is emphasized by the following language of section 28 of the Creek Treaty (Act March 1, 1901, 31 Stat. 861), as follows:

" The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the *final rolls of citizenship of said tribes, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons.*"

And also by the language already quoted from section 2 of the Indian Appropriation Bill of March 3rd, 1901 (31 Stat. 1058, 1077), to-wit:

" The rolls made by the Commission to the Five Civilized Tribes, *when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent.*"

The meaning of the word "final" of course, depends upon the context of the sentence to some extent, but when used as used in this statute, it means conclusive. See:

Sharon v. Hill, 26 Fed. 337-389;

Rindeau, v. Beaumette, 4 Minn. 224;
Blanding v. Sayles, 49 Atl. 992, 23 R. L. 226,
and
Appeal of Bixler, 59 Cal. 550.

The fact that at the time of the passage of this act there was great dissatisfaction with the courts in the Indian Territory in admitting persons to citizenship, who had been excluded therefrom by the Commission to the Five Civilized Tribes; the fact that it was necessary to complete the enrollment of the different tribes at an early date in order to allot their lands; the fact that the Commission to the Five Civilized Tribes was given full authority and jurisdiction and ample machinery to make a full and complete investigation of the right of their application for membership in the tribe and was required to make investigation of the rights of all persons, whether these persons were seeking enrollment or not so that the rolls might be completed, taken together with the use of the word "final" repeated as it was in these statutes, indicates clearly that Congress did not intend for the courts to have anything to do with enrolling or refusing to enroll any members of the tribes.

It is a matter of public history that while the enrollments were being made, the courts scrupulously and continually refused to interfere in any way what-

ever with the enrolling or refusing to enroll any person as a member of the tribes. It appears there is no escape from the conclusion that Congress meant that the action of the Commission should be really final in the sense that no court should at any time undertake to undo what the Commission had already done.

The government's position on this point is impossible, would lead to intolerable confusion, and, we respectfully submit, is absurd, for reasons which may be briefly stated thus: Admitting that the Commission had the jurisdiction to pass upon the question and find that a member of the tribe who was actually alive April 1, 1899, was dead, the government denies that the Commission had the power upon hearing the evidence relating to the question to adjudge a member of the tribe as alive April 1, 1899, if, in fact, he died before that date. *If the Commission could bar from the final rolls a member of the tribe actually alive April 1, 1899, it could, in the exercise of that same jurisdiction, enroll as one of the units for final allotment a member of the tribe who had died prior to that date. The power to exclude is precisely the same as the power to include.* The reports of the Commission to the Five Civilized Tribes of which this court will take notice, show that many thousand members of the various tribes died about

dates at which members had to be alive in order to be entitled to enrollment, and the Commission reports that it became necessary *to investigate carefully all of these cases, to hear the evidence relating thereto and to pass judicial judgment in each case upon the question, Was the member alive on the date named for closing the rolls?* How can it be said, with any show of reason, that the Commission was without the jurisdiction to find one actually alive April 1, 1899, as dead, and to deny him enrollment? Certainly this was done in many cases. *Is authority to exclude and thereby finally pass upon the question has never been denied. But does the jurisdiction to decide against a member of the tribe always include the power to decide for him?* Out of a hundred and forty thousand alleged members of the tribe, either in person or by their heirs, applied for citizenship in the Five Civilized Tribes and were refused by the Commission. Have their rights been adjudicated? Must the entire matter of citizenship be opened again? Have the courts the right to correct the mistakes made by the Dawes Commission except as in public land cases? If the courts do have such jurisdiction, then it must follow the case of these hundred and forty thousand persons that the question of their right to citizenship in the tribes is still open; and they in person or their heirs have the right to have their claims determined

by a tribunal with power to pass upon the question. If this court sustains the government, these claimants will arise to contend for their rights either in the courts or seek relief through Congress. If their claims have not been passed upon authoritatively the policy of the government will not permit that they be barred from participating in the final distribution of the tribal property without an opportunity to be heard before a tribunal with the jurisdiction to determine their claims. This vast number of claimants were excluded from citizenship in the Five Tribes in the exercise of precisely the same power that admitted Thlocco to enrollment. *If the Commission could make a mistake against an applicant and render final judgment against him, certainly, in the exercise of the same authority, it could make a mistake in favor of an applicant; otherwise there can be no end to these matters.*

The government must either abandon its action or take the position that the enrollment and allotment of Thlocco were absolutely null and void, assuming that in fact he died prior to April 1, 1899. But this position *would strike from the statutes above quoted the various provisions making the rolls "final."* *If the position of the government is sound, then in every case where in fact the allottee died before the date for closing the rolls, the entire*

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of the Commission was a nullity and the making the enrollment of such persons final effect whatever. But the courts do not own statutes of this sort and make them pass. Take the case of Thlocco and many of his class: Let it be admitted for the sake of argument that he died before April 1, 1899. What would be said as to him and his class as regards the effect of the above statutes making the enrollment final? We propound to counsel for the government: *In what respect are the rolls "final" as to those of his class if their enrollment can be annulled without showing fraud or gross misfeasance or facts proved or error of law?* We need not go at length the proposition that the word *final* must be given some effect.

Let us consider the practical effect of the government's contention that the enrollment of Thlocco is entirely void. It is a matter of common knowledge shown by the Commission's reports that thousands were enrolled whose death occurred before the dates for closing the respective rolls of the classes. If the doctrine is established that a void renders the enrollment and allotment utterly void, then it must follow that the patents are utterly void, that not even innocent purchasers of the land can be protected. What is to become of the

thousands of innocent purchasers who have bought these lands relying upon the judgments of the Commission? If the government prevails, no lawyer in the east half of Oklahoma can ever pass a land title as good where it appears that the death of the allottee occurred near the date for closing the rolls. In an administration case the state court might hear the evidence, determine the heirs and adjudge the date of the allottee's death and fix that date at a time sustaining the title, but such decree would not bind the government, which might bring a suit at any time for the use of the members of the tribe. *To sustain the government is to strike down all the titles in every case where the Commission made a mistake, it matters not how great the investigation or how weighty the testimony tending to show that the allottee was alive at the date fixed for closing the rolls. Such a conclusion, if reached by this court, would produce intolerable conditions and so impair many of the Indian titles that no prudent purchaser would seriously consider a purchase.*

The position of the government, stated in another manner, is this: Though the Commission to the Five Civilized Tribes may have had substantial and convincing evidence, though they may have proceeded with all the care and caution that characterizes a court of equity, nevertheless if the govern-

seems that there has been discovered at this late more weighty evidence tending to show Thlocco died before April 1, 1899, the courts try the question, Was Thlocco alive April 1, 1899. An examination of all the evidence introduced by the government shows conclusively that the Commission did pass upon Thlocco's right to enrollment *in 1899*. Counsel for the government say they have no other evidence. If the judgment of the Commission was not final the court decree in this case would not be final. Let us suppose that the government's case is sustained and the case is tried and that the court finds that Thlocco was alive April 1, 1899, the evidence being conflicting, as it would certainly be if there is a trial. Let us further suppose that after the judgment in favor of the heirs becomes final the government discovers most positive evidence showing that Thlocco died before April 1, 1899, what would prevent the prosecution of another case against the heirs? *If the theory of the government is correct, the court has no jurisdiction by which to establish the right of Thlocco to an allotment. If the Commission had no authority to admit a dead man as alive, the court has no jurisdiction to determine that a dead man was alive. There would be no end to these contentions if the government succeeds.*

In this matter there is only one of three decisions possible. *First*. It may be held that the question of citizenship in the tribe was a political one and therefore not subject to impeachment upon any ground whatever after March 4, 1907, the date for closing the rolls; or, *second*, it may be held that the rolls made by the Dawes Commission approved by the Secretary of the Interior were made final by acts of Congress and therefore are not subject to impeachment upon any ground; or, *third*, the court may adopt the view of the Circuit Court of Appeals for the Eighth Circuit announced in a line of decisions extending over a period of almost twenty years, and hold that the question of citizenship in the tribe was judicial and that the findings of the Commission may be impeached as in land cases for error of law, gross mistake of the facts proved or for fraud, but upon no other ground.

We do not believe that our contention that the rolls are impervious to attack is in conflict with *United States ex rel Lowe v. Fisher*, 223 U. S. 95, 56 L. ed. 364, where it was held that the Secretary of the Interior, *prior to March 4, 1907*, by reason of express statutes, had the authority after due notice to the allottee and a hearing to cancel his enrollment; for the court found this authority in the statutes which gave the Secretary revisory and correct-

power over the rolls until March 4, 1907. There is no statutory authority for this action.

Having presented our contention that the rolls are final and not subject to impeachment upon any ground, we shall, during the further course of this brief, assume, for the purposes of argument, that the rolls may be impeached in proper cases.

B

The jurisdictional point involved is this: Did the Commission have power to deal with the question, as Barney Thlocco alive April 1, 1899, to hear the particular facts relating to this question, and to determine whether or not the facts were sufficient to invoke the exercise of that power? The test of its jurisdiction is whether the Commission had power to enter upon the inquiry, not whether its conclusion in the course of it is right or wrong. It was by the exercise of precisely the same jurisdiction or power that the Commission struck some names from the Creek tribal rolls because they died before April 1, 1899, and enrolled others because they were found to be alive on that date.

The authorities cited by the government on the question of jurisdiction examined. A finding by the Commission that a dead man was alive is not analo-

gous to an adjudication in an administration matter that a living man is dead.

—*United States v. Winona & St. P. R. Co.*, 15 C. C. A. 96, 67 Fed. 948;

United States v. Northern Pac. R. Co., 37 C. C. A. 290, 95 Fed. 864;

French v. Fyan, 93 U. S. 169, 23 L. ed. 812;

New Dunderberg Min. Co. v. Old, 25 C. C. A. 116, 79 Fed. 598;

Noble v. Union River Log. Co., 147 U. S. 164, 37 L. ed. 123;

United States v. Schurz, 12 Otto. 378, 102 U. S. 273, 26 L. ed. 167;

St. Louis Smelting Co. v. Kemp, 14 Otto. 636, 104 U. S. 636, 26 L. ed. 875;

Folk v. United States, 233 Fed. 177.

See, also, authorities under "C—The authority and jurisdiction of the Commission to the Five Civilized Tribes as defined by the authorities."

Shall the Court Become a Dawes Commission?

The case of *Folk v. United States*, 233 Fed. 177, by the Circuit Court of Appeals for the Eighth Circuit, covers this entire question so fully that we invite the examination of that case in its entirety. It involved the allotment of Thomas Atkins. The government charged, as in this case, that Thomas Atkins was not alive April 1, 1899, but failed to show

that the Commission enrolled Atkins arbitrarily and without evidence, just as the government failed here. The Court of Appeals, in a most exhaustive and learned opinion, reviewed the acts of Congress conferring jurisdiction upon the Dawes Commission for the enrollment of the Indians and the allotment of the lands in the Five Civilized Tribes, followed and approved the opinions theretofore handed down by that court extending over a period of many years, and declared that the Dawes Commission was a special tribunal created to hear and determine the questions here sought to be retried, holding the test of the jurisdiction was not whether the Commission decided right or wrong, but whether it had the power to enter upon the inquiry of the matter decided. The Commission found that Atkins was alive April 1, 1899, and its judgment was held conclusive and not subject to collateral attack. *The Circuit Court of Appeals has held for seventeen years that the courts will not do the work of the Dawes Commission.*

The fundamental error of the government, it seems to us, is the failure to distinguish between the want of jurisdiction and a wrong conclusion reached in the exercise of jurisdiction. The question whether the finding of the Commission was wrong, is not here involved. The real point involved is: Did the Commission have the authority to deal with the question,

Was Barney Thlocco alive April 1, 1899? Did the Commission have the authority to hear the particular facts relating to the question, Was Barney Thlocco alive April 1, 1899? Did the Commission have the authority to determine whether or not the facts before the Commission were sufficient to invoke the exercise of the Commission's power? The unfailing test of jurisdiction in such a matter is, Did the Commission have power to enter upon the inquiry? Since Congress had provided that all Creek citizens who were living April 1, 1899, should be enrolled and should be entitled to allotments and that all of the lands of the Creek Nation and the funds of the Creek Tribe should be distributed to such enrolled citizens, the same being regarded as units for the distribution of the tribal property, and since it was further provided that if any citizen entitled to enrollment and allotment died before receiving his lands and his distributive share of the funds of the tribe that the same should be allotted and distributed to his heirs, it became necessary to commit to some tribunal the matter of making the tribal rolls and the determination in every case where the citizen had died whether or not the death occurred before April 1, 1899. Such determination of the date of the death of the citizen was a prerequisite to the right of enrollment in every case. It is a matter of common knowledge that the Creek people were dying rapidly. Some point of

time had to be fixed for the distribution of the property of the tribe, and some authority had to have full and complete jurisdiction to inquire into every case of death and to determine whether or not the citizen was living on April 1, 1899. *The authority of the Commission to the Five Civilized Tribes to deal with the question, Was Barney Thlocco alive April 1, 1899? the power and duty to hear the particular facts relating to that question and to determine that question of fact, constitutes its jurisdiction in this matter.*

The case of *United States v. Winona & St. P. R. Co.*, 15 C. C. A. 96, 67 Fed. 948, defines the jurisdiction of the land department of the government. It was there held:

“ Jurisdiction of the subject matter is the power to deal with a general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. *The test of jurisdiction is whether the tribunal has power to enter upon inquiry, not whether its conclusion in the course of it is right or wrong.*” (Italics ours.)

In the *Winona* case, the Circuit Court of Appeals for the Eighth Circuit, in its opinion by Judge SANBORN, after reviewing the authorities, announced that the decisions are in harmony with the following

rules: (1) A patent or certificate of the land department over which the land department has no power of disposition and no jurisdiction to determine the claims of applicants for, is void. (2) A patent or certificate of the land department to land over which the department has the power of disposition and the jurisdiction to determine who will take it, is not void, but conveys the title. (3) That a court of equity may, in a direct proceeding for that purpose, set aside a certificate or patent for error of law, for gross mistake of the facts proved, or for fraud.

The *Winona* case was brought by the United States against the railroad to set aside the certification from the United States to the State of Minnesota of certain lands. The bill was grounded on the fact that at the respective times of the location of the railroad, homestead entries or preemption filings had been made upon the lands, so that the same were excepted from the grant to the state for the benefit of the railroad company. The existence of the homestead entries and preemption filings was conceded by the appellees, their defense being that the certification of the lands to the state for the benefit of the railroad conveyed the legal title, and that the complainant had to impeach the patent by proving either a mistake of law, a gross mistake of fact, or fraud. In answering the contention that the land was not

subject to the jurisdiction of the land department, this court said, after referring to the well known rules for attacking a patent:

“ These propositions are not seriously questioned by counsel for the government, but his contention is that the land department was without jurisdiction to decide whether these lands fell within the grants to the railroad company, and rightfully belonged to it, or were excepted from these grants, and were open to pre-emption, homestead, and purchase by other parties; and he maintains that, since this department was without jurisdiction to decide this question, the certificates to the state which it delivered were issued without authority, and were absolutely void. In support of these views, he has cited many authorities from the decisions of the Supreme Court, but a careful examination of these decisions has convinced us that they do not rule this case. They are cases in which the power to hear and determine the claims of the parties to the land in controversy, and to convey it to the rightful claimant, was not vested in the land department when it rendered its decision and made its conveyance. They are cases in which the title to the land patented or certified had passed out of the government, and hence was not within the jurisdiction of the officers of the land department when that tribunal decided and attempted to convey it, as in *Polk v. Wendal*, 9 Cranch, 87; *Stoddard v. Chambers*, 2 How. 284, 318; *Easton v. Salisbury*,

21 How. 426, 432; *Reichart v. Felps*, 6 Wall. 160; *Best v. Polk*, 18 Wall. 112, 117, 118; *Sherman v. Buick*, 93 U. S. 209; *Iron Co. v. Cunningham*, 15 Sup. Ct. 103; or cases in which the land was reserved from sale or disposition by the land department until a claim under a Mexican or Spanish grant should be determined, and the power to determine the extent and validity of this claim had been conferred upon tribunals other than the land department, and the final decisions of those tribunals had not been made when the claim of the patentee was initiated, as in *Doolan v. Carr*, 125 U. S. 618, 624, 632, 8 Sup. Ct. 1228; or cases in which the land had been set apart as a portion of a military or other like reservation, and had thus ceased to be a part of the public domain, subject to sale or other disposition by the officers of the land department, as in *U. S. v. Stone*, 2 Wall. 525, 527, and *Wilcox v. Jackson*, 13 Pet. 499, 511. In all these cases the land that was the subject matter of the patents or certificates, and the rights of the claimants to it, were not subject to the jurisdiction of the land department. That department had no jurisdiction to hear and determine these claims, or upon such determination to dispose of the lands. On the other hand, in every case to which our attention has been called, in which the power to hear and determine the claims of applicants for lands of the United States, and upon such determination to dispose of those lands, either under the pre-emption or homestead laws, under grants for railroads or other corporations, or by sale, or

in any other recognized mode, has been vested in the land department, the Supreme Court has uniformly held that patent or certificate issued from the department conveyed the legal title, and was not subject to collateral attack. *Minter v. Crommelin*, 18 How. 87, 89; *U. S. v. Schurz*, 102 U. S. 378, 401; *French v. Fyan*, 93 U. S. 169, 172; *Quinby v. Conlan*, 104 U. S. 420; *Smelting Co. v. Kemp*, 104 U. S. 636, 645-647; *Steel v. Refining Co.*, 106 U. S. 447, 450, 452, 1 Sup. Ct. 389; *Heath v. Wallace*, 138 U. S. 573, 585, 11 Sup. Ct. 380; *Knight v. Association*, 142 U. S. 161, 212, 12 Sup. Ct. 258; *Noble v. Railroad Co.*, 147 U. S. 174, 13 Sup. Ct. 271; *Barden v. Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. 1030.

“ The distinction between the two classes of cases is well illustrated by *Best v. Polk*, 18 Wall. 112, 117, 118, and *Minter v. Crommelin*, 18 How. 89. In the former case a tract of land was sold by the land department, and patented to a purchaser in 1847. But a Chickasaw Chief had perfected his title to this land in 1839, under the provisions of a treaty between the United States and the Chickasaw Indians. The Supreme Court held the patent void, because the title to the land had passed out of the United States before the claim of the patentee was initiated, and hence the officers of the land department had no jurisdiction over the subject-matter of the patent. But in the latter case the land patented to a pre-emptor had been reserved by Act of Congress to a Creek warrior, but the act provided that, if the warrior abandoned his reservation, it should

be forfeited, and the Secretary of the Interior might order its sale. The Supreme Court held that the patent was *prima facie* evidence that the warrior had abandoned his reservation, that the Secretary had ordered the sale, and that the legal title had passed to the pre-emptor.

“ Another striking illustration of this distinction is found in *Doolan v. Carr*, 125 U. S. 618, 630, 8 Sup. Ct. 1228, and *Quinby v. Conlan*, 104 U. S. 420. In the former case, the plaintiff, Carr, brought ejectment in reliance upon a title derived from a patent issued to the Central Pacific Railroad Company in 1874 under the Pacific Railroad acts. Those acts excepted from their grants to the railroad company the lands claimed under Mexican or Spanish grants. By the Act of March 3, 1851 (9 Stat. 632), a commission had been created to determine the extent and validity of such claims under Mexican grants. An appeal was allowed by that act from the decision of the commission to the District Court of California, and from the decision of that court to the Supreme Court of the United States. The land patented to the Central Pacific Railroad Company in that case was within the limits of a claim under a Mexican grant, which was in litigation before some of these tribunals when the grants were made to the Central Pacific Railroad Company, and when the line of its railroad was definitely fixed, and the claim under the grant was finally sustained by the Supreme Court long after those dates. The jurisdiction to hear and determine the claim to this land un-

the Mexican grant had been conferred by Act of Congress upon tribunals other than the land department; and the court held that the patent issued to the railroad company by that department was absolutely void, and its action to eject the plaintiff from the premises without jurisdiction or authority. But in *Quinby v. Conlan* (an action of ejectment), the patent under which the plaintiff claimed was attacked by an attempt to show that the land was within a reservation under a Mexican grant when the rights of the pre-emptor were initiated. The determination of that question depended upon whether or not the public surveys had been extended over the land, and whether or not other land had been taken by the claimant under the Mexican grant in satisfaction of it. The Supreme Court held that the patent was a conclusive determination of this question, and could not be collaterally attacked, because the question whether the land had been so freed from the reservation under the Mexican grant as to be open to settlement and pre-emption depended upon matters disclosed by records of proceedings in the land department, and that the department had the jurisdiction to determine those questions.

In *Steel v. Refining Co.*, 106 U. S. 447, 451, Sup. Ct. 389 (an action of ejectment), the plaintiff's title depended upon a patent issued upon a claim for mineral lands within the limits of a townsite; and the defense was that the patent was void because the land was not mineral, and the patentee was not a citizen and had not

declared his intention to become one. The Supreme Court held that proof of these facts was inadmissible to attack the patent, and declared that the land department 'must necessarily consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is unassailable, except by direct proceedings for its annulment or limitation.' To the same effect are *Heath v. Wallace*, 138 U. S. 573, 575, 11 Sup. Ct. 380, and *Barden v. Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. 1030.

" In *French v. Fyan*, 93 U. S. 169, 172, the Supreme Court held that parol evidence was inadmissible to show that land patented to the state of Missouri as swamp and overflow land never was in fact swamp or overflowed land, and that, therefore, the patent was void.

" *Ehrhardt v. Hogaboom*, 115 U. S. 67, 69, 5 Sup. Ct. 1157, that court held that parol evidence was inadmissible to show that land patented to a pre-emptor was swamp or overflowed land, and was therefore included in the grant to the State of California, and that the patent to the pre-emptor was consequently void. The Supreme Court held in these cases that the Acts of Congress devolved upon the land department the duty and conferred upon it the power to determine what lands were of the description granted by the Acts of Congress, and that its decision on that subject was impregnable to collateral attack.

“ These authorities, and those above cited which we have not reviewed, perhaps sufficiently illustrate the distinction between the cases in which the land department has acted upon a subject-matter within and one without its jurisdiction. A careful study and analysis of these decisions will show that none of them are inconsistent with the following rules: (1) A patent or certificate of the land department to land, over which that department has no power of disposition and no jurisdiction to determine the claims of applicants for, under the Acts of Congress, is absolutely void, and conveys no title whatever. Land, the title to which had passed from the government to another party before the claim on which the patent is based was initiated, land reserved from sale and disposition for military and other like purposes, land reserved by a claim under a Mexican or Spanish grant *sub judice*, and land for the disposition of which the Acts of Congress have made no provision, is of this character. *Polk v. Wendal*, 9 Cranch. 87, and cases cited under it, *supra*. (2) A patent or certificate of the land department to land over which that department has the power of disposition and the jurisdiction to determine the claims of applicants for, under the Acts of Congress, is impregnable to collateral attack, whether the decision of the department is right or wrong, and it conveys the legal title to the patentee or to the party named as entitled to that title in the patent or certificate. *Minter v. Crommelin*, 18 How. 87, 89, and cases cited under it, *supra*. (3) A

court of equity may, in a direct proceeding for that purpose, set aside such a patent or certificate, or declare the legal title under it to be held in trust for one who has a better right to it, in cases in which the action of the land department has resulted from fraud, mistake, or erroneous views of the law. *Bogan v. Mortgage Co.*, 11 C. C. A. 128, 63 Fed 192, 195; *Cunningham v. Ashley*, 14 How. 377; *Barnard's Heirs v. Ashley's Heirs*, 18 How. 43; *Garland v. Wynn*, 20 How. 6; *Lytle v. State*, 22 How. 193; *Lindsey v. Hawes*, 2 Black 554, 562; *Johnson v. Towsley*, 13 Wall. 72, 85; *Moore v. Robbins*, 96 U. S. 538; *Bernier v. Bernier*, 147 U. S. 242, 13 Sup. Ct. 244; *Mullen v. U. S.*, 118 U. S. 271, 278, 279, 6 Sup. Ct. 1041; *Moffat v. U. S.*, 112 U. S. 24, 5 Sup. Ct. 10.

“ It is not difficult to determine whether the certificates issued in this case were void or voidable when tested by these rules. Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. The test of jurisdiction is whether the tribunal has power to enter upon the inquiry, not whether its conclusion in the course of it is right or wrong. *Foltz v. Railway Co.*, 8 C. C. A. 635, 60 Fed. 316, 318, and cases cited.

“ When these certificates were issued, the Winona Railroad Company had undoubtedly ap-

plied to the land department for conveyances of the lands in controversy to the state for its benefit. These lands were a part of the public lands of the United States, the disposition of which had been intrusted to that department by the Acts of Congress which establish it and defined the powers and duties of its officers. Moreover, the Acts of Congress under which the Winona Company claimed these lands expressly provided, as we have seen, that the Secretary of the Interior should indicate the lands granted under them in all cases. The conclusion is irresistible that these acts conferred the power and imposed the duty upon the officers of the land department to hear and determine the ultimate question whether or not the railroad company was entitled to these lands under its grants, and to 'indicate' the lands granted by certificates or patents to the state. In no other way could they have discharged the duties these acts imposed upon them. In deciding this question they necessarily considered whether or not the railroad company had so far complied with the acts granting the lands that it had earned them, the character of the lands themselves, and the class to which they belonged, the time of the definite location of the line of the railroad, the homestead entries and pre-emption filings that were then upon the lands, the cancellation of all these entries and filings that had been made, and, finally the legal effect of all these and all other material facts upon the claim of the railroad company to receive the lands under the Acts of Congress. It now appears that they were mis-

taken as to the legal effect of these facts, but the question they decided was one which the Acts of Congress authorized and required them to decide—one which they were obliged to decide before they issued the certificates; and, although their decision and their conveyances evidenced by these certificates may be voidable, they are not absolutely void."

Apply the doctrine of the foregoing case: The Commission to the Five Civilized Tribes had the authority to determine who constituted the final units for the distribution of the public domain of the Creek Nation and had the power under the rules and regulations of the Secretary of the Interior to allot the land. The Commission's jurisdiction was, therefore, complete within the rules announced in the *Winnona* case. The only reasonable contention that the government can make here is that the certificate and patent are voidable by the government. But to avoid the force of the certificate of allotment which passed title to the heirs and to impeach the patent which is a solemn judgment of the Commission and of the Secretary of the Interior, the government must show a mistake of law, which is another way of saying under the pleadings and issues in this case that the government must show that there was no evidence before the Commission upon the question: Was Barney Thlocco alive April 1, 1899?

The case of *French v. Fyan*, 93 U. S. 169, 23 L. ed 812, was an action in which the award of the land department was attacked as void because the department was authorized only to certify swamp lands and had, in fact, in this case, certified as swamp land that which was not in fact swamp lands. The court overruled this contention, saying:

“ *It would be substituting the jury or the court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would be making the patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey.*” (Italics ours.)

In the case of *United States v. Northern Pac. R. Co.*, 37 C. C. A. 290, 95 Fed. 864, the action was to avoid a patent issued to the railroad company by the land department of the government. The court said, in discussing the jurisdiction of the land department:

“ The land department is a *quasi-judicial* tribunal, and a patent is the judgment of that tribunal upon the questions presented, and a conveyance in execution of the judgment. When it is attacked, two questions are presented. They are: Did the department have jurisdiction to issue the patent and to determine the questions which conditioned its issue? and, Was its judg-

ment induced by fraud, mistake of fact, or error in law? The limits of the jurisdiction of this department, and the classes of cases which fall within that jurisdiction, have been considered and stated by this court with some care in *U. S. v. Winona & St. P. R. Co.*, 32 U. S. App. 272, 282-286, 15 C. C. A. 96, 103-107, and 67 Fed. 948, 955-959, to which reference is made for a more extended discussion of this subject. *The rule, broadly stated, is that the land department has jurisdiction over every case in which the control and disposition of the land is intrusted to its care, and that its judgment in such a case, whether right or wrong, conveys the legal title to the patentee, and is valid, unless avoided for error, mistake, or fraud.* The land in dispute in this case, and the tract of land in the place limits of the grant to this company, in lieu of which the patent to this land was issued, were intrusted to this department for disposition, and the power was granted to it, and the duty imposed upon it, to hear and determine the question who was entitled to the conveyance of this land from the government. Its judgment was therefore not without jurisdiction, and its patent conveyed the legal title.

“ The other question is: Was this patent void because the decision upon which it was based was induced by error, fraud, or mistake of fact? A court of equity has the power to set aside such a patent in a case in which the action of the department has resulted from a clear error of law. *Bogan v. Mortgage Co.*, 27 U. S. App. 346,

350, 11 C. C. A. 128, 130, and 63 Fed. 192, 195, and cases there cited. Its decision of a question of fact, however, is conclusive, even in a direct proceeding to set aside the patent, unless it is first made to appear clearly that its adjudication was caused by a plain mistake or was induced by fraud or perjury. There is no general appeal from the officers of the land department to the courts; and the latter cannot review the decisions of questions of fact rendered by those officers in the absence of convincing proof that they were induced by fraud or mistake." (Italics ours.)

In *New Dunderberg Min. Co. v. Old*, 25 C. C. A. 116, 79 Fed. 598, the court defined the test of jurisdiction in the land department as follows:

" The test of jurisdiction is whether or not the tribunal has power to enter upon the inquiry, not whether its conclusion in the course of it is right or wrong."

And again, on the same point:

" Jurisdiction of the subject matter is the power to deal with the general abstract question."

This rule brings us to the one decisive question in the case: Did the Commission to the Five Civilized Tribes have the power to deal with the question of

Barney Thlocco's right to enrollment as a citizen of the Creek Nation, which question involves the inquiry: Was Barney Thlocco alive on April 1, 1899?

The case of *Noble v. Union River Logging R. R. Co.*, 147 U. S. 165, 37 L. ed. 123, contains a most comprehensive discussion of jurisdiction. This was a bill in equity by the railroad company to enjoin the Secretary of the Interior from executing a proposed order revoking the approval of the plaintiff's maps for a right of way over the public lands. *The defense alleged was that the Department was without jurisdiction to award the right of way to the railroad for the reason that the road was not a common carrier as required by the act authorizing the Secretary to award the right of way and that the existence of the railroad as a common carrier was a jurisdictional fact without which the Secretary had no power to act. In short it was contended that the award could only be made to a common carrier and that the railroad had no existence as a common carrier. That is to say it was contended that the railroad was a fictitious person or a myth so far as the right to receive the right of way, was concerned. The court held otherwise, saying:*

“ The position of the defendants in this connection is, that the existence of a railroad, with the duties and liabilities of a common carrier of

freight and passengers, was a jurisdictional fact, without which the secretary had no power to act, and that in this case he was imposed upon by the fraudulent representations of the plaintiff, and that it was competent for his successor to revoke the approval thus obtained; in other words, that the proceedings were a nullity, and that his want of jurisdiction to approve the map may be set up as a defense to this suit.

“ It is true that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such, for example, as the service of process within the state upon the defendant in a common law action. (*D'Arcy v. Ketchum*, 52 U. S. 11 How. 165 (13:548); *Webster v. Reid*, 52 U. S. 11 How. 437 (13:761); *Harris v. Harde-man*, 55 U. S. 14 How. 334 (14:444); *Pennoyer v. Neff*, 95 U. S. 714 (24:565); *Borden v. Fitch*, 15 Johns 141); the seizure and possession of the *res* within the bailiwick in a proceeding *in rem* (*Rose v. Himely*, 8 U. S. 4 Cranch. 241 (2:608); *Thompson v. Whitman*, 85 U. S. 18 Wall. 457 (21:897), a publication in strict accordance with the statute, where the property of an absent defendant is sought to be charged. *Galvin v. Page*, 85 U. S. 18 Wall. 350 (21:959); *Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137 (35:116). So, if the court appoint an administrator of the estate of a living person, or, in a case where there is an executor ca-

pable of acting (*Griffith v. Frazier*, 12 U. S. 8 Cranch. 9 (3:471), or condemns as lawful prize a vessel that was never captured (*Rose v. Himely*, 8 U. S. 4 Cranch. 241, 269 (2:608, 617); or a court martial proceeds and sentences a person not in the military or naval service (*Wise v. Withers*, 7 U. S. 3 Cranch. 331 (2:457); or the Land Department issues a patent for land which has already been reserved or granted to another person, the act is not voidable merely, but void. In these and similar cases the action of the court or officer fails for want of jurisdiction over the person or subject matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding.

“ There is, however, another class of facts which are termed quasi-jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. With respect to these facts, the finding of the court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties. Examples of these are the allegations and proof of the requisite diversity of citizenship, or the amount in controversy in a Federal Court, which, when found by such court, cannot be questioned collaterally. (*Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U. S. 552 (31:202); *Re Sawyer*, 124 U. S. 200, 220 (30:402, 409); the existence and amount of the debt of a

petitioning debtor in an involuntary bankruptcy (*Michaels v. Post*, 88 U. S. 21 Wall. 398 (22:-520); *Betts v. Bagley*, 12 Pick. 572); the fact that there is insufficient personal property to pay the debts of a decedent, when application is made to sell his real estate (*Comstock v. Crawford*, 70 U. S. 3 Wall. 396 (18:34); *Grignon v. Astor*, 43 U. S. 2 How. 319 (11:283); *Florentine v. Barton*, 69 U. S. 2 Wall. 210 (17:783); the fact that one of the heirs of an estate had reached his majority, when the act provided that the estate should not be sold if all the heirs were minors (*Thompson v. Tolmie*, 27 U. S. 2 Pet. 157 (7:-381); and others of a kindred nature, where the want of jurisdiction does not go to the subject-matter or the parties, *but to a preliminary fact necessary to be proven to authorize the court to act*. Other cases of this description are *Hudson v. Guestier*, 10 U. S. 6 Cranch. 281 (3:224); *Ex parte Watkins*, 28 U. S. 3 Pet. 193 (7:650); *United States v. Arredondo*, 31 U. S. 6 Pet. 691, 709 (8:547, 554); *Dyckman v. New York*, 5 N. Y. 434; *Jackson v. Crawford*, 12 Wend. 533; *Jackson v. Robinson*, 4 Wend. 436; *Fisher v. Bassett*, 9 Leigh, 119, 131; *Wright v. Douglas*, 10 Barb. 97, 111. In this class of cases, if the allegation be properly made, and the jurisdiction be found by the court, such finding is conclusive and binding in every collateral proceeding. And even if the court be imposed upon, by false testimony, its finding can only be impeached in a proceeding instituted directly for that purpose. *Simms v. Slacum*, 7 U. S. 3 Cranch, 300 (2:446). (Italics ours.)

“ This distinction has been taken in a large number of cases in this court, in which the validity of land patents has been attacked collaterally, and it has always been held that the existence of lands subject to be patented was the only necessary prerequisite to a valid patent. In the one class of cases, it is held that if the land attempted to be patented had been reserved, or was at the time no part of the public domain, the Land Department had no jurisdiction over it and no power or authority to dispose of it. In such cases its action in certifying the lands under a railroad grant, or in issuing a patent, is not merely irregular, but absolutely void, and may be shown to be so in any collateral proceeding. *Polk v. Wendal*, 13 U. S. 9 Cranch. 87 (3:665); *Patterson v. Winn*, 24 U. S. 11 Wheat. 380 (6:500); *Jackson v. Lawton*, 10 Johns, 23; *Minter v. Crommelin*, 59 U. S. 18 How. 87 (15:279); *Reichert v. Felps*, 73 U. S. 6 Wall. 160 (18:849); *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629 (28:1122); *United States v. Southern Pac. R. Co.*, 146 U. S. 615 (36:1104).

“ Upon the other hand, if the patent be for lands which the Land Department had authority to convey but it was imposed upon, or was induced by false representations to issue a patent, the finding of the department upon such facts cannot be collaterally impeached, and the patent can only be avoided by proceedings taken for that purpose. As was said in *St. Louis Smelt. & Ref. Co. v. Kemp*, 104 U. S. 636, 640 (27:875, 876); ‘In that respect they’ (the offi-

ers of the Land Department) 'exercise a judicial function, and, therefore, it has been held in various instances by this court, that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment.' In *French v. Fyan*, 93 U. S. 169 (23:812) it was held that the action of the Secretary of the Interior in identifying swamp lands, making lists thereof, and issuing patents therefor, could not be impeached in an action at law by showing that the lands which the patent conveyed were not in fact swamp and overflowed lands, although his jurisdiction extended only to lands of that class. Other illustrations of this principle are found in *Johnson v. Towsley*, 80 U. S. 13 Wall. 72 (20:85); *Moore v. Robbins*, 96 U. S. 530 (24:848); *Steel v. St. Louis Smelt. & Ref. Co.*, 106 U. S. 47 (27:226); *Quinby v. Conlan*, 104 U. S. 420 (26:800); *Vance v. Burbank*, 101 U. S. 514 (25:929); *Hoofnagle v. Anderson*, 20 U. S. 7 Wheat. 212 (5:437); *Ehrhardt v. Hogaboom*, 15 U. S. 67 (29:346). In *Moore v. Robbins*, 96 U. S. 530 (24:848), it was said directly that it is a part of the daily business of officers of the Land Department to decide when a party has by purchase, by pre-emption or by any other recognized mode, established a right to receive from the government a title to any part of the

public domain. This decision is subject to an appeal to the Secretary of the Interior if taken in time; 'but if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the President, is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all authority of control of the Executive Department over the land and over the title which it has conveyed * * *. The functions of that department necessarily cease when the title has passed from the government.'

“ We think the case under consideration falls within this latter class. The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and when decided and his approval was noted upon the plats, the first section of the act vested the right of way in the railroad company. The language of that section is 'that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory,' etc. The uniform rule of this court has been that such an act was a grant *in praesenti* of lands to be thereafter identified. *Denver & R. G. R. Co. v. Alling*, 99 U. S. 463 (25:438). The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken di-

rectly for that purpose. If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained. *Moffat v. United States*, 112 U. S. 24 (28:623); *United States v. Minor*, 114 U. S. 233 (29:110). A revocation of the approval of the Secretary of the Interior, however, by his successor in office was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void. As was said by Mr. Justice GRIER, in *United States v. Stone*, 69 U. S. 2 Wall. 525, 535 (17:765, 767): 'One officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of the court.' *Moore v. Robbins*, 96 U. S. 530 (24:848). The case of *United States v. Schurz*, 102 U. S. 378 (26:167) is full authority for the position assumed by the plaintiff in the case at bar. In this case the relator had been adjudged to be entitled to 160 acres of the public lands, the patent had been regularly signed, sealed, countersigned and recorded; and it was held that a mandamus to the Secretary of the Interior to deliver the patent to the relator should be granted. It was said in this case by Mr. Justice MILLER: 'Whenever this takes place' (that is, when a patent is duly executed) 'the land has ceased to be the land of the government, or, to speak in technical language, title has passed from the government, and the power of these officers to deal with it has also passed away.'

“ It was not competent for the Secretary of the Interior thus to revoke the action of his predecessor, and the decree of the court below must, therefore, be affirmed.”

In the case of *United States v. Schurz*, 12 Otto. 378, 26 L. ed. 173, the court in distinguishing between a void and voidable patent said :

“ If a patent should issue for land in the State of Massachusetts, where the government never had land, it would be absolutely void. If it should issue for land once owned by the government, but long before sold and conveyed by patent to another who held possession, it might be held void in a court of law on the production of the senior patent. But such is not the case before us. Here the question is whether this land had been withdrawn from the control of the land department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void.”

In *St. Louis Smelting & Refining Co. v. Kemp*, 14 Otto. 636, 26 L. ed. 875, in discussing this question, it was said :

“ The general doctrine declared may be stated in a different form, thus : a patent, in a court

of law, is conclusive as to all matters properly determinable by the land department, when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed. Thus, in *Minter v. Crommelin*, reported in 18th Howard, 87 (59 U. S. XV, 279), where it appeared that an Act of Congress of 1815 had provided that no land reserved to a Creek warrior should be offered for sale by an officer of the land department unless specifically directed by the Secretary of the Treasury, and declared that if the Indian abandoned the reserved land it should become forfeited to the United States, a patent was issued for the land, which did not show that the Secretary had ordered it to be sold, and the court said: 'The rule being that the patent is evidence that all previous steps had been regularly taken to justify making a patent, and one of the necessary steps here being an order from the Secretary to the register to offer the land for sale because the warrior had abandoned it, we are bound to presume that the order was given. That such is the effect, as evidence, of the patent produced by the plaintiffs was adjudged in the case of *Bagnell v. Broderick*, 13 Pet. 448, and is not open to controversy anywhere, and the state court was mistaken in holding otherwise.'

“ On the other hand, a patent may be collaterally impeached, in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands, that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars, the judgment of the department, upon matters properly before it, is not assailed nor is the regularity of its proceedings called into question, but its authority to act at all is denied and shown never to have existed.

“ According to the doctrine thus expressed and the cases cited in its support, and there are none in conflict with it, there can be no doubt that the court below erred in admitting the record of the proceedings upon which the patent was issued, in order to impeach its validity. The judgment of the department upon their sufficiency was not, as already stated, open to contestation. If in issuing a patent its officers took mistaken views of law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities, as will con-

trol the legal title in the patentee's hands. *Boggs v. Merced Mining Co.*, 14 Cal. 279, 363. It does not lie in the mouth of a stranger to the title, to complain of the act of the government with respect to it. If the government is dissatisfied it can, on its own account, authorize proceedings to vacate the patent or limit its operation. * * *.

“ The case at bar, then, is reduced to the question whether the patent to Starr is void on its face; that is, whether, read in the light of existing law, it is seen to be invalid. It does not come within any of the exceptions mentioned in the cases cited. The lands it purports to convey are mineral, and were a part of the public domain. The law of Congress had provided for their sale. The proper officers of the land department supervised the proceedings. It bears the signature of the President, or rather of the officer authorized by law to place the President's signature to it, which is the same thing; it is properly countersigned, and the seal of the general land office is attached to it.”

The authorities cited by the government on the question of jurisdiction examined. The finding by the Commission that a dead man was alive is not analogous to an adjudication in an administration matter that a living man is dead.

In *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, a judgment of a probate court holding that a live man was dead is held to be void upon the ground that to

sustain such judgment *would deprive him of his property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.* While all the courts holding such an adjudication void appear to place it upon the constitutional question in the arguments, reference is made to the fact that the very presence of the living man is a *demonstration* of the mistake, and that the judgment, if permitted to stand, would be a *shocking injustice.* But the ground of the decision in each case is that such judgment was rendered without notice to the living man, and to sustain it would take from him his property without due process of law. *Neither the Creek Nation nor the government can invoke any of these grounds.* The government cannot be heard to say there was no notice when it appeared by its officers; the Creek Nation appeared by its attorney; the Creek Nation further appeared by the Creek Commission and its head men. Nor can it be said that the government may now *demonstrate* that there was a mistake. At the most if the question were retried there would be but a conflict of evidence. Nor can it be claimed that any shocking injustice will result from the Commission's judgment. It must be admitted that the *Commission, unlike the probate court, had the power to adjudge a member of the tribe who was living on April 1, 1899, as dead,* else the entire question of enrollment is still open.

The Commission was constituted, among other things, to find, determine and *adjudge the date of the death, whether is was before or after April 1, 1899.* The power to judge always carries with it the power to misjudge the evidence and therefore to make a mistake.

Iowa Land and Trust Company v. United States,
Known as the Hawkins case.

The case of *Iowa Land & Trust Company v. United States*, 217 Fed. 11, known as the *Hawkins* case, is unsound, as suggested by Judge Hook in a dissenting opinion, insofar as it holds the enrollment and allotment there involved absolutely void. *It is sound in holding that as between the government and the heirs of Chester Hawkins, the allottee, the enrollment and allotment were voidable in a direct proceeding brought for that purpose.* Chester Hawkins died before April 1, 1899. His heirs, *by fraud and perjury, induced the Commission to enroll Chester Hawkins upon their false representations that he was alive April 1, 1899.* The bill was upon the theory that the enrollment and allotment might be impeached for fraud of the beneficiaries, *and when so impeached that the court might retry the question, Was Chester Hawkins alive April 1, 1899?* and that was the order of the trial. The evidence showed con-

vincingly that the heirs by their perjured testimony procured the enrollment. That left a situation in which the government was permitted to retry the question, Was Chester Hawkins alive April 1, 1899, and the evidence showed conclusively that he was dead prior to that date. *But Hawkins was regarded as alive in contemplation of law until the judgment of the Dawes Commission was impeached for fraud. In that case it would have been held that Hawkins was alive April 1, 1899, in contemplation of law for the purposes of that action if the judgment of the Commission had not been impeached for fraud.* So here, Barney Thlocco must be considered as alive in contemplation of law until the judgment of the Commission is impeached for mistake of law, that being the ground upon which this action was commenced. As between the government, which was imposed upon by the heirs, on the one hand, and the heirs on the other, the Circuit Court of Appeals for the Eighth Circuit considered the enrollment and allotment as a nullity and that the allottee was for the purposes of that action as between the government and the heirs a fictitious person. This much of the opinion is sound and in accord with authority. But the further holding that the allotment was absolutely void by which an innocent purchaser's title was stricken down, is not only against the authorities but, we respectfully submit, is unreasonable, and is at war with

the theory upon which the government prevailed. The opinion by the Court of Appeals taken as a whole, shows that the impeachment of the judgment of the Dawes Commission was regarded as a necessary prerequisite to the retrial of the question, was Chester Hawkins alive April 1, 1899, which shows that the court did not treat the enrollment and allotment as an absolute nullity but as voidable merely. In *Folk v. United States*, 233 Fed. 177, Judge SANBORN, in an exhaustive and learned opinion, shows that even if an allottee was in fact dead before April 1, 1899, the judgment of the Commission *is voidable only* and subject only to direct attack, *and that in contemplation of law such allottee must be regarded as alive until the judgment of the Commission is impeached in a direct proceeding for that purpose, and that an innocent purchaser will be protected who has relied upon the public records made by the government of the United States.* Moreover, the opinion of the two judges in the *Hawkins* case shows, we respectfully submit, a misunderstanding of the allotment scheme in the Indian Territory. Under Proposition III of this brief we set forth in great detail the history of this general allotment scheme, and show that the allotment scheme was in the nature of a partition; that the patents are not like the ordinary patents from the government; that the allottees did not take their titles by grant, as in public land cases,

but by partition or allotment. We show elsewhere in this brief how it will be utterly impossible for lawyers to pass land titles in that part of Oklahoma formerly the Indian Territory if it is held that the enrollment and allotment of a citizen in fact dead April 1, 1899, is to be regarded as an absolute nullity. Such a holding by this court would produce an intolerable situation.

Counsel for the government cite cases holding personal judgments void where no service was had and there was no appearance by the defendant. But the enrollment and allotment of Thlocco was not in the nature of a personal judgment but more in the nature of an action *in rem*. The Commission was dealing with the tribal property for the purposes of partition. The first step in the partition scheme was to establish the *status* of enrolled members of the tribe and of all applicants for citizenship. No question of want of notice arises here because the government and the Creek Nation were present, acting and participating through their agents, attorneys and representatives.

Counsel for the government also cite cases where judgments have been held void for want of jurisdiction of the subject matter. But certainly the Commission had jurisdiction of the subject mat-

n this case, having been constituted to hear the
ence, weigh it, and determine whether or not
occo and those similarly situated were entitled to
me units for the final partition of the tribal
erties. The Commission was directed by Con-
s after having determined the *status* of all those
ne tribal rolls or who might apply for enrollment
lot the land. Full and complete jurisdiction was
erred upon the Commission.

There are many analogies in the law to the
tion under consideration. We think a natural-
on judgment is of a closely kindred character.

As early as 4th Peters, in the case of *Spratt v.*
att, p. 407, Chief Justice MARSHALL said:

“ The various acts upon the subject submit
the decision on the right of aliens to admission
as citizens to courts of record. They are to re-
ceive testimony, to compare it with the law, and
judge on both law and fact. The judgment is
entered on record as the judgment of the court.
It seems to us, if it be in legal form, to close all
inquiry, and, like every other judgment, to be
complete evidence of its own validity.”

So, in *State v. Hoeflinger*, 35 Wisconsin, 400, the
ned judge said:

“ This record of the court of plaintiff’s nat-
uralization was conclusive upon this question

in this collateral proceeding. It was the record of a judgment and imports absolute verity."

The same doctrine was announced in *McCarthy v. Marsh*, 5 N. Y. 263.

C

The authority and jurisdiction of the Commission has been defined in the following cases:

Kimberlin v. Commission to the Five Civilized Tribes, 44 C. C. A. 109, 104 Fed. 653;

Wallace v. Adams, 74 C. C. A. 540;

Wallace v. Adams, 204 U. S. 415, 51 L. ed. 547;

Uinta Tunnel Co. v. Creede, 57 C. C. A. 200, 119 Fed. 164;

Neff v. United States, 91 C. C. A. 241, 165 Fed. 273;

Johnson v. Drew, 171 U. S. 93, 43 L. ed. 88;

Nunn v. Hazelrigg, 132 C. C. A. 474, 216 Fed. 330;

Malone v. Alderdice, 129 C. C. A. 204, 212 Fed. 668;

Folk v. United States, 233 Fed. 177.

The case of *Kimberlin v. The Commission to the Five Civilized Tribes*, *supra*, is a leading authority upon all questions which involve the powers or juris-

tion of the Commission to the Five Civilized Tribes. After reviewing various Acts of Congress conferring jurisdiction upon the Commission, this court said:

“ Conceding, however, but not deciding, that the application of the plaintiff in error was in time to entitle her to a hearing and decision, that the facts which she alleged were admitted, and that it was the duty of the commission to hear and decide the question of her right to citizenship according to the law and the very right of the matter, the power and duty of the courts below and of this court are no less certain. It is conceded that the commissioners are executive officers. It is not their sole or chief function to hear and determine controversies between contending parties. *Nevertheless, in the determination of the citizenship* of the parties who apply to them for membership in the Five Nations, they are vested with *judicial powers* by the Acts of Congress. They have authority to compel the attendance of witnesses, to send for persons and papers, to hear evidence, ‘to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship,’ and above all they are empowered ‘*to hear and determine the application of all persons who apply to them for citizenship.*’ This grant of power is plenary. It vests the authority and imposes the duty upon this commission to hear and to decide every question of law and of fact which is material to

the right of the applicant to enrollment as the citizen of a nation. Take the case at bar. The facts are conceded. But do these facts entitle the applicant to be enrolled as a citizen of the Chickasaw Nation? Does the provision of article 38 of the treaty of 1866, that 'every white person who, having married a Choctaw or Chickasaw, resides in said Choctaw or Chickasaw Nations * * * is to be deemed a member of said Nation,' apply to those who, like the plaintiff, were married subsequent to the adoption of the treaty? Are the amendments of the laws of the Chickasaw Nation made by its legislature in 1887 and in 1890, which by their terms prohibit the plaintiff from acquiring any rights of citizenship in that nation by her inter-marriage with the white widower of a deceased Indian woman, void, in the face of the treaty, or are they consistent with its provisions and with the Acts of Congress, and fatal to the claim of the plaintiff in error? The consideration and decision of these questions were indispensable to the determination of the plaintiff in error's right to the citizenship she sought, and the Acts of Congress intrusted *their consideration* and decision to the judgment and discretion of the Commission, and not to those of the courts. Under these Acts of Congress the Commission to the Five Civilized Tribes is a special tribunal, vested with judicial power to hear and determine the claims of all applicants to citizenship in the Five Tribes, and its enrollment or refuse to enroll the applicant in each partic-

ular case constitutes its judgment in that cause. In the case before us this tribunal has heard and determined the claim of the plaintiff. Whether its decision was right or wrong is immaterial in this court, and that question will not be considered. Congress saw fit to intrust to the *judicial discretion* of the Commission the determination of the application of the plaintiff in error, and of every question of law and of fact which that decision involved."

The case of United States against the heirs of Barney Thlocco must be determined in favor of the heirs upon the rules announced in the *Kimberlin* case where it was said: that in the determination of the citizenship in the tribe the Commissioners were vested with judicial powers by Acts of Congress; that the Commission had plenary power; that Congress had vested in the Commission and had imposed on the Commission the duty *to hear and determine and decide every question of law and of fact material to the right of enrollment*; that the enrollment by the Commission or the refusal to enroll in each particular case constitutes the Commission's judgment in that cause; that whether the decision of the Commission was right or wrong is immaterial to the court and that question cannot be considered. The enrollment of Barney Thlocco was, therefore, the solemn judgment of the Commission and this judgment was

rendered as we shall show more fully elsewhere, upon inquiry into the question, Was Barney Thlocco alive April 1, 1899, and upon substantial evidence which satisfied the Commission that Thlocco was alive April 1, 1899, and entitled to enrollment. The character of the Commission's judgment as defined in the *Kimberlin* case brings the government to its one insuperable difficulty. The complainant alleges and attempted to prove, in order to impeach the judgment of the Commission, that they acted arbitrarily and without evidence and without any belief on the question as to whether or not Barney Thlocco was alive on April 1, 1899, and therefore entitled to enrollment. But since all the Government's proof shows affirmatively that this Indian was enrolled in regular manner according to the ordinary and approved procedure in such cases, and upon evidence, the Government undertakes to escape from its own theory by taking the position that, regardless of the manner in which the Indian was enrolled, his enrollment was a nullity if in fact he died before April 1, 1899. The Government's new position, inconsistent with the bill, is another way of stating the erroneous view that a wrong conclusion reached by the Commission in the ordinary course of the exercise of its power, is void.

In *Neff v. United States*, 91 C. C. A. 241, 165 Fed. 273, the doctrine of the *Kimberlin* case is again announced.

In *Johnson v. Drew*, 171 U. S. 93, 43 L. ed. 88, in discussing the jurisdiction of the Land Department of the Government, the court said:

“ It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether for instance a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact, not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to those questions, is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined.”

In *Nunn v. Hazelrigg*, 132 C. C. A. 474, 216 Fed. 330, the case of *Kimberlin v. Commission to the Five Civilized Tribes*, is approved as follows:

“ The Dawes Commission thus created and existing was a *quasi-judicial* body. *Kimberlin v. Commission to Five Civilized Tribes*, 104 Fed. 653, 44 C. C. A. 109. It was expressly required to make separate rolls of the Indians and freed-

men. To be enrolled as a Creek Indian, it was not sufficient for an applicant to show that he was an Indian, but he must show, and the Commission must find, that he was an Indian of the Creek Tribe; and to be enrolled as a freedman it was not sufficient to show that he was an African, but he must show, and the Commission must find, that he was a former slave or the descendant of a former slave of some member of the Creek Tribe, or at least a slave of some other person adopted by the Creek Nation. It was therefore necessary for an applicant for enrollment to show upon what grounds he was entitled to such enrollment; that he was of Creek Indian blood; that he was a Creek Freedman, became a citizen of the tribe by the treaty of June 14, 1866; or that he had without any such rights become a member of the tribe by adoption. And, when the Commission found by any one of these methods, a person was entitled to enrollment, the manner in which he was found to be entitled to such enrollment was adjudicated as much as the mere fact of the right of enrollment."

In the *Nunn-Hazelrigg* case, an effort was made to impeach the finding of the Commission as to the blood of a Creek citizen. The Commission was authorized to make rolls by blood—an Indian roll and a Freedman roll. Would the Government contend that where the Commission has heard and passed upon the question whether an applicant was an Indian or Freedman, and has determined that question on

evidence, and has made a finding, that the finding is void if wrong? In the Choctaw and Chickasaw Nations Freedmen citizens of the tribe received in the final distribution of the lands only a very small share as compared with Indian citizens. Could the government now be heard to assert that certain Indian citizens of those tribes are in fact freedmen and that they therefore received too much of the public domain of the tribe? We put the question: *Did the Commission have the jurisdiction to enroll a freedman as an Indian? The Commission could no more make a negro an Indian than it could make a dead man alive, but the Commission did have complete authority to determine whether the applicant was a freedman or an Indian and the finding when properly made in the ordinary course of the Commission's administration is entirely conclusive in the courts.* In a proper case perhaps the government might impeach the finding of the Commission that an applicant is an Indian and have the court adjudge such applicant a freedman, but this could be done upon one of the well recognized grounds for attacking the finding of the Land Department. Certainly the finding by the Commission that a freedman is an Indian is not void.

In *Malone v. Alderdice*, 129 C. C. A. 204, 212 Fed. 669, this court again affirmed the doctrine of the

Kimberlin case saying: "The Commission to the Five Civilized Tribes which made the enrollment of their citizens and freedmen, was a *quasi*-judicial tribunal, empowered to determine who should be enrolled and what lands should be allotted and in what way it should be allotted to every citizen and freedman and its adjudication of these questions and of every issue of law and fact that it was necessary for it to determine in order to decide these questions, is conclusive and impervious to collateral attack."

There was only one possible method of attack upon the issues framed in this case, namely, the government might have shown, had it been able to do so, that there was no evidence before the Commission to sustain its finding and upon such a showing a decree should have been for the complainant, but not otherwise.

The recent case of *Folk v. United States*, 233 Fed. 177, by the Circuit Court of Appeals for the Eighth Circuit, is squarely in point, and supports the defendants in all respects. This is known as the *Atkins* case. The United States commenced the action on the theory that Thomas Atkins, the allottee, died before April 1, 1899. As to the power and jurisdiction of the Commission to the Five Civilized Tribes, the court said:

“ These defendants were, and for many months had been, in the exclusive possession of the land which is the subject of this controversy, exploring it for oil and gas and extracting oil from it under patents and a title fair on their face and adjudged valid, so far as the defect asserted in this case is concerned, the right of Thomas Atkins to enrollment as a Creek citizen by the Dawes Commission, a *quasi*-judicial tribunal, to which, by the Creek Agreement, the Congress and the Creek Tribe intrusted the power and upon which it imposed the duty to decide that question, a tribunal whose jurisdiction of that question and of every other issue it was necessary for it to consider and determine in reaching its decision was conclusive upon all and impervious to collateral attack, either by the Creek Nation, the United States, or any other party in interest. *Kimberlin v. Commission of Five Civilized Tribes*, 104 Fed. 653, 662, 44 C. C. A. 109, 118; *Malone v. Alderdice*, 212 Fed. 668, 670, 129 C. C. A. 204, 206. To avoid this incontrovertible rule the Creek Tribe and the United States, for the sole benefit of the Creek Tribe, make this direct attack upon the decision and judgment of the Dawes Commission that Thomas Atkins was entitled to enrollment as a member of the Creek Tribe and upon the patents based on that adjudication by a complaint in equity to avoid and set them all aside on the ground that there was no information or evidence before the Commission to sustain its adjudication.

“ The claim of the Creek Tribe, the only party plaintiff that has any pecuniary interest in this litigation, is conditioned by the existence of its alleged right to avoid that adjudication and the patents founded on it on the ground that there was no evidence of the qualifications of Thomas Atkins for enrollment before the Commission which adjudged him entitled thereto and no evidence before it that he was living on April 1, 1899. That adjudication, the allotment of this land to Thomas Atkins, and the patents to him were all public records open to the inspection of the Creek Nation from 1903 until the present time, but no attack upon their justice or verity was ever made until this suit was filed in 1915, more than 11 years after the completion of the adjudication, the patents, and the public record thereof.”

The decisions of the Supreme Court of Oklahoma are to the same effect.

D

The government pleaded and attempted to prove only a mistake of law.

—*Howe v. Parker*, (C. C. A.) 190 Fed. 738;

Harnage v. Martin, 40 Okla. 341, 136 Pac. 154;

James v. Germania Iron Co., 46 C. C. A. 476, 107 Fed. 597;

Folk v. United States, 233 Fed. 177.

An error of law or a mistake of law is a judgment rendered or a finding made without any evidence in support thereof. A mistake of fact by the land department or the Commission is a misapprehension of the *facts proved*. Where complainant relies upon a mistake of law as ground for recovery, it is necessary to show that there was no evidence to support the finding, and it is necessary to prove and plead the evidence that was before the Commission so that the court may determine first of all, before a re-examination of the facts tried by the Commission, whether there was any evidence to sustain the finding. Where a complainant relies upon error of law he comes saying there was no evidence and this allegation presents the one issue to be inquired into in order to impeach the finding. On the other hand where a mistake of fact is pleaded as a ground for recovery, the complainant comes saying there was evidence before the land department or the Commission and there was a gross misapprehension of the facts proved. This class of cases is well illustrated by such errors as mistake as to the township or range number in which a tract of land is located; a mistake as to the lot or block number of a town lot; the award to A by inadvertence where the evidence shows that B is entitled to receive the award. Where a complainant's bill is framed on the theory that the evidence before the department was insuffi-

cient to support the finding, then there is presented the issue: Was there a mistake of law? However, if the government relied in this case upon a mistake of fact the situation of the complainant would not be improved because in such case the complainant must plead and prove all the evidence that was before the department in order that the court may determine whether or not there was a gross misapprehension of the facts proved.

In *Howe v. Parker, supra*, the Circuit Court of Appeals for the Eighth Circuit clearly defines error of law and mistake of fact using the following language in the second syllabus:

“ Whether or not there is any evidence to sustain a charge, a claim, or a finding of fact in a controversy before the Land Department over the title to the public land is a question of law, and an error in the decision of that question which results in the issue of a patent to the wrong party is remediable in equity.”

And in the body of the opinion:

“ Whether or not the weight of evidence in substantial conflict sustains the one or the other side of an issue of fact is a question upon which, in cases within his jurisdiction, the final decision of the Secretary of the Interior is conclusive in the absence of fraud or gross mistake. But

whether or not there is at the close of a final trial or hearing before him any evidence to sustain a charge or a finding of fact in support of it is in his and in every judicial and quasi-judicial tribunal a question of law. *Ward v. Joslin*, 186 U. S. 142, 147, 22 Sup. Ct. 807, 46 L. ed. 1093; *United States Fidelity & G. Co. v. Board of Com'rs*, 145 Fed. 144, 151, 76 C. C. A. 114, 121; *Laing v. Rigney*, 160 U. S. 531, 540, 16 Sup. Ct. 366, 40 L. ed. 525; *Southern Pacific Company v. Pool*, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. ed. 485; *The Francis Wright*, 105 U. S. 381, 387, 26 L. ed. 1100; *Clement v. Insurance Co.*, 7 Blatchf. 51, 53, 54, 58, Fed. Cas. No. 2882; *Delaware, Lackawanna & Western R. Co. v. Converse*, 139 U. S. 469, 472, 11 Sup. Ct. 569, 35 L. ed. 213. And an injurious error of the Secretary in finally deciding that question presents good ground for relief in equity. The Land Department of the United States is a quasi-judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and its decisions of the issues presented at such hearings are impervious to collateral attack. But its judgments and patents do not conclude the rights of claimants to the land. They rest on established principles of law and fixed rules of procedure the application of which to each case conditions its right decision, and if the officers of the Land Department are induced to issue a patent to the wrong party by an erroneous view of the law or by a gross mistake of the *facts proved*, or by a decision in-

duced by fraud, the rightful claimant is not remediless. He may in a court of equity avoid the effect of the decision and the patent and charge the legal title derived from it with a trust in his favor. *Lytle v. State of Arkansas*, 22 How. 193, 203, 16 L. ed. 306; *Smelting Co. v. Kemp*, 104 U. S. 636, 647, 26 L. ed. 875; *Moore v. Robbins*, 96 U. S. 530, 536, 538, 24 L. ed. 848; *Bogan v. Edinburg American Land M. Co.*, 63 Fed. 192, 195, 11 C. C. A. 128, 130; *United States v. Winona & St. Peter R. Co.*, 67 Fed. 948, 958, 15 C. C. A. 96, 106; *U. S. v. Northern Pac. R. Co.*, 95 Fed. 864, 870, 37 C. C. A. 290, 296; *Cunningham v. Ashley*, 14 How. 377, 14 L. ed. 462; *Barnard's Heirs v. Ashley's Heirs*, 18 How. 43, 15 L. ed. 285; *Garland v. Wynn*, 20 How. 6, 15 L. ed. 801; *Johnson v. Towsley*, 13 Wall. 72, 85, 20 L. ed. 485; *Bernier v. Bernier*, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. ed. 152.

“ A complete copy of all the evidence before the Secretary at the final hearing is made a part of the bill in hand, and the first question to be considered is, was there *any* evidence that Henry Howe violated the Acts of Congress of 1889 and disqualified himself as a homesteader?”

In *Harnage v. Martin*, 40 Okla. 341, 136 Pac. 155, the Supreme Court of Oklahoma followed *Howe v. Parker*, *supra*, in defining an error of law, using the following language :

“ In *Howe v. Parker*, *supra*, Judge SANBORN, who delivered the opinion for the court said:

‘Whether or not the weight of evidence in substantial conflict sustains the one or the other side of an issue of fact is a question upon which, in cases within his jurisdiction, the final decision of the Secretary of the Interior is conclusive in the absence of fraud or gross mistake. But whether or not there is at the close of a final trial or hearing before him any evidence to sustain a charge or a finding of fact in support of it is in his and in every judicial and *quasi*-judicial tribunal a question of law.’ In support of this statement of the law numerous authorities are cited. If the Secretary of the Interior in rendering his decision assumed a fact established which was necessary to the rights of the prevailing party, but which there was wanting any evidence to support, the error committed by him was one of law, and plaintiff may have it reviewed by a court of equity in a proceeding brought to avoid the effect of the decision of the Secretary of the Interior.”

To allege that there was evidence before the Land Department but that there was no evidence to support the finding made by the department is precisely the same as to say that there was no evidence heard at all. This brings us therefore to the test laid down in *Howe v. Parker, supra*, Was there any evidence to support the finding of the Commission?

E.

If the finding of the Commission was based upon any evidence, the action of the Commission enrolling Thlocco is conclusive. The courts cannot inquire into the extent of investigation made by the Commission. The enrollment of Thlocco is a determination or judgment not only that he had the right to be enrolled, but that he was enrolled in the manner required by law. The trial court held properly that the government must prove first of all that there was no evidence before the Commission before a retrial of the issue passed upon by the Commission. The findings of fact by trial court are against the government.

- Paine v. Foster*, 9 Okla. 213, 53 Pac. 109;
Hartwell v. Havighorst, 11 Okla. 189, 66
Pac. 337;
Same, 196 U. S. 635, 49 L. ed. 629;
Howe v. Parker, 111 C. C. A. 466, 190 Fed.
739;
Sanford v. Sanford, 139 U. S. 642, 35 L. ed.
290;
Harnage v. Martin, 40 Okla. 341, 136 Pac.
154;
DeCambra v. Rogers, 189 U. S. 119, 47 L.
ed. 734;
M'Goldrick Lbr. Co. v. Kinsolving, 137 C.
C. A. 377, 221 Fed. 819;

James v. Germania Iron Co., 46 C. C. A. 476,
107 Fed. 597;

U. S. v. Atherton, 102 U. S. 372, 26 L. ed.
213;

Kimberlin v. Commission, 44 C. C. A. 109,
104 Fed. 653;

U. S. v. Northern Pac. R. Co., 37 C. C. A.
290, 95 Fed. 864;

Durango Land Co. v. Evans, 25 C. C. A. 523,
80 Fed. 425;

Goings v. Chapman, 18 Ind. 194;

Nordyke v. Shearon, 12 Ind. 346;

Colo. Coal Co. v. U. S., 123 U. S. 307, 31 L.
ed. 182;

U. S. v. Iron Silver Min. Co., 128 U. S. 673,
32 L. ed. 572;

U. S. v. Maxwell Land Grant Co., 121 U. S.
325, 30 L. ed. 949;

Folk v. United States, 233 Fed. 177.

In *Paine v. Foster*, *supra*, the Supreme Court of Oklahoma, in a similar matter, announced the rule that if there is any evidence, however slight, tending to support the conclusion of the Secretary of the Interior, then his conclusion becomes final, and the courts will not review the weight of the evidence. Syllabus 5 of that case is as follows:

“ When the petition sets out all the evidence taken before the Land Department, the decision

of the register and receiver, and of the superior officers on appeal, and contains the allegation that the final decision of the Secretary of the Interior, adverse to the claimant, had no evidence or facts of any character for its basis, but that such decision was rendered without any evidence or circumstances whatever to warrant the same. A court of equity will review the evidence sufficiently to determine the question as to whether there was any evidence tending to support the secretary's conclusions, or from which a reasonable inference could be properly drawn, warranting his findings. If there is any evidence, however slight, tending to support the conclusion of the Secretary of the Interior in a controverted land case, or if there are facts and circumstances detailed in evidence from which such conclusions may be reasonably and rationally inferred, then such conclusions become final, and the courts will not review the weight of the evidence."

In *Hartwell v. Havighorst*, *supra*, the Supreme Court of Oklahoma held a petition seeking to attack the decision of the Land Department for alleged error of law bad for the reason that it failed to show that there was no evidence to support the decision of the Secretary of the Interior.

The Supreme Court of the United States, 196 U. S. 635, 49 L. ed. 629, affirmed the case of *Hartwell v. Havighorst*, which was grounded solely upon the

proposition that the petition in such a matter must affirmatively show that there was no evidence before the department.

In *Howe v. Parker*, 111 C. C. A. 466, 190 Fed. 739, the decision by this court turned entirely upon the question whether there was any evidence before the department.

In *Sanford v. Sanford*, 139 U. S. 642, 35 L. ed. 290, the Supreme Court announced the rule that the conclusions of the Land Department are not open to review for alleged errors of law in passing upon the *weight* of evidence presented to the department, for the reason that this would make a court of equity a reviewing court for the department, which was never contemplated by Congress.

In *DeCambra v. Rogers*, 189 U. S. 119, 47 L. ed. 734, it was held:

“ A decision of the Land Department upon question of fact is conclusive on the courts. It is hardly necessary to say that when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination.”

In *M'Goldrick Lbr. Co. v. Kinsolving*, 137 C. C. A. 377, 221 Fed. 819, 826, it was said:

“ The Land Department is charged with the administration of the laws of Congress relative to the disposition of the public domain. It must see that the provisions of law are complied with by intending donees and purchasers, and is constituted a tribunal for determining and deciding all matters of fact pertaining to applications, entries, and proofs, and by the uniform holding of the Supreme Court its findings and decisions as to such matters are final and conclusive, if it be there is any pertinent testimony upon which to base them. If the officers of the Land Department err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reversed and annulled by the courts in controversies between private parties founded on their decisions; ‘but,’ says Mr. Justice FIELD in *Shepley v. Cowan*, 91 U. S. 330, 340 (23 L. ed. 424):

‘for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department, and perhaps, under special circumstances, to the President.’

“ See also, *Johnson v. Towsley*, 13 Wall. 72, 20 L. ed. 485; *Burfenning v. Chicago, St. Paul, etc., Ry.*, 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. ed. 175; *Johnson v. Drew*, 171 U. S. 93, 99, 18

Sup. Ct. 800, 43 L. ed. 88; *Gardner v. Bonestell*, 180 U. S. 362, 369, 21 Sup. Ct. 399, 45 L. ed. 574; *DeCambra v. Rogers*, 189 U. S. 119, 122, 23 Sup. Ct. 519, 47 L. ed. 734."

In *James v. Germania Iron Co.*, 46 C. C. A. 476, 107 Fed. 597, in discussing the effect of the finding of the Land Department of the Government, this court, by Judge SANBORN, said:

" The Land Department of the United States is a *quasi*-judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and its decisions of the issues presented at such hearings are impervious to collateral attack, and presumptively right. A patent to land of the disposition of which the Department has jurisdiction is both the judgment of that tribunal and a conveyance of the legal title to the land. 9 Stat. 395, c. 108, Sec. 3; Rev. St., Secs. 441, 453; *U. S. v. Winona & St. P. R. Co.*, 67 Fed. 948, 955, 15 C. C. A. 96, 103, 32 U. S. App. 272, 283. But the judgment and conveyance of the Department do not conclude the rights of the claimants to the land. They rest on established principles of law and fixed rules of procedure, which condition their initiation and prosecution, the application of which to the facts of each case determines its right decision; and, if the officers of the Land Department are induced to issue a patent to the wrong party by an erroneous view of the law, or by a gross or fraudulent mistake of the facts,

the rightful claimant is not remediless. He may avoid this decision, and charge the legal title derived from the patent which they issue with an equitable right to it on either of two grounds: (1) That upon the facts found, conceded, or established without dispute at the hearing before the Department its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the patent to him, and to give it to another (*Bogan v. Mortgage Co.*, 63 Fed. 192, 195, 11 C. C. A. 128, 130, 27 U. S. App. 346, 350; *U. S. v. Winona & St. R. Co.*, 67 Fed. 948, 958, 15 C. C. A. 96, 106, 10 U. S. App. 272, 288; *U. S. v. Northern Pac. Co.*, 95 Fed. 864, 870, 37 C. C. A. 290, 296; *Cunningham v. Ashley*, 14 How. 377, 14 L. ed. 46; *Barnard's Heirs v. Ashley's Heirs*, 18 How. 415, 15 L. ed. 285; *Garland v. Wynn*, 20 How. 6, 15 L. ed. 801; *Lytle v. Arkansas*, 22 How. 193, 15 L. ed. 306; *Lindsey v. Hawes*, 2 Black. 554, 560, 17 L. ed. 265; *Johnson v. Towsley*, 13 Wall. 785, 20 L. ed. 485; *Moore v. Robbins*, 96 U. S. 530, 538, 24 L. ed. 848; *Bernier v. Bernier*, 1 U. S. 242, 13 Sup. Ct. 244, 37 L. ed. 152); (2) that through fraud or gross mistake they fell into a misapprehension of the facts proved before them, which had the like effect (*Gonzalez v. French*, 164 U. S. 338, 342, 17 Sup. Ct. 102, 42 L. ed. 458). If he would attack the patent on the latter ground, and avoid the Department's finding of facts, however, he must allege and prove not only that there was a mistake in the finding, but the evidence before the Department from which the mistake resulted, the particular

mistake that was made, the way in which it occurred, and the fraud, if any, which induced it, before any court can enter upon the consideration of any issue of fact determined by the officers of the Department at the hearing. *U. S. v. Northern Pac. R. Co.*, 95 Fed. 864, 870, 882, 37 C. C. A. 290, 296, 308; *U. S. v. Atherton*, 102 U. S. 372, 374, 26 L. ed. 213; *U. S. v. Budd*, 144 U. S. 154, 167, 168, 12 Sup. Ct. 575, 36 L. ed. 384; *U. S. v. Mackintosh*, 85 Fed. 333, 336, 29 C. C. A. 176, 179, 56 U. S. App. 483, 490; *U. S. v. Throckmorton*, 98 U. S. 61, 66, 68, 25 L. ed. 93; *Marquez v. Frisbie*, 101 U. S. 473, 476, 25 L. ed. 800; *Steel v. Refining Co.*, 106 U. S. 447, 451, 1 Sup. Ct. 389, 27 L. ed. 226; *French v. Fyan*, 93 U. S. 169, 172, 23 L. ed. 812; *Ehrhardt v. Hogaboom*, 115 U. S. 67, 69, 5 Sup. Ct. 1157, 29 L. ed. 346; *Heath v. Wallace*, 138 U. S. 573, 575, 11 Sup. Ct. 380, 34 L. ed. 1063; *Barden v. Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. ed. 992. The bill in the case before us is based on the first ground."

Having concluded that the only question involved in the case was, Did the Department err as a matter of law? the court thereupon stated:

" The only question, therefore, which is left for consideration, is whether or not this finding is sustained by the evidence, and it comes here with the presumption of soundness and with the burden on the appellants to show its error."

In *Durango Land Co. v. Evans*, 25 C. C. A. 523, 80 Fed. 425, the Circuit Court of Appeals for the

Eighth Circuit, in discussing the effect of a finding by the Land Department of the government, said:

“ And inasmuch as the findings of the Land Department on questions of fact are conclusive, when the charge is that the Land Department has erred in the decision of a mixed question of law and fact, what the facts were, as laid before and found by the department, must be shown, so as to enable the court to see clearly that the law has been misconstrued. * * * The court cannot say that the law was misconstrued by the officers of the Land Department, unless their findings upon questions of fact are disclosed or enough undisputed facts are disclosed which were proven before the department to make it plain that an error of law was committed. * * * The presumption is that all such questions are brought to the attention of the department and were duly considered and properly decided. * * * The burden was on the complainant, therefore, and it sought to reopen the controversy for errors of law to show what the facts were before the Land Department to show the law was applied.”

In *Colorado Coal & Iron Co. v. United States*, 123 U. S. 307, 31 L. ed. 182, it was alleged that the patents were void because made to fictitious persons not in being. The patents were attacked upon the alleged ground that the Coal Company had procured entries to be made in the name of fictitious persons for the sole purpose of acquiring the titles in the

company in fraud of the government, but it was held that even if the patent had been made to fictitious persons that they were not on that account void but voidable only, and it was further held that the government could prevail only by impeaching the patents upon the ground that they were procured by fraud. This case completely meets the contention of the government that a patent issued in the name of a person not in being is absolutely void.

In no event could the government show in this case that the patent is void because in virtue of various Acts of Congress upon the death of the citizen entitled to receive the allotment his heirs took precisely as the allottee would have done had he lived to receive his distributive share of the public domain. The issuance of the allotment certificate and the patent in the name of the dead citizen was, as we shall show conclusively, we believe, hereinafter, mere difference in form so that in every matter of substance the situation was the same as if the certificate and patent had issued in the name of the heirs. In the *Colorado Coal* case the government was held squarely to prove, if it could, that the patent was procured by fraud. For exactly the same reason the government here must be held to prove that the patent was issued on account of an error of law, that is to say, the government cannot prevail without clear, positive and

convincing proof that there was no evidence before the Commission upon the question, Was Barney Thlocco alive April 1, 1899. The *gravamen* of the government's alleged case is that there was no evidence before the Commission.

In the recent case of *Folk v. United States*, 233 Fed. 178, the Circuit Court of Appeals for the Eighth Circuit has fully and ably determined this entire question, using the following language:

“ Did the plaintiffs establish the fact that there was a strong probability that on the merits of this suit they would finally secure the relief they seek? They ask to avoid the deliberate adjudication of the Dawes Commission rendered more than 12 years before their suit was commenced, that Thomas Atkins was entitled in 1901 to enrollment as a Creek Indian, the allotment, and the patents based thereon, upon the ground, not that the Commission was induced by any fraud or misrepresentation to render that judgment, but that there was no information or evidence before the Commission to sustain its conclusion, and especially that there was none to warrant the indispensable preliminary finding (the Creek Agreement, Act March 1, 1901, 31 Stat. 870, c. 676, Sec. 28; Act June 28, 1898, 30 Stat. 502, c. 517, Sec. 21), that Thomas Atkins was living April 1, 1899. Conceding, but not considering or deciding, that the absence of such information or evidence would be fatal to the judgment of the Commission, a proposition

which counsel for the defendants strenuously challenge, was the evidence sufficient to establish that absence? The legal presumption was that there was information and evidence sufficient to sustain the judgment and the patents based upon it. The burden was on the plaintiffs to prove, not that there was insufficient evidence, but that there was no substantial information or evidence, to sustain the judgment. It was a heavy burden, one that could not be borne by the production of a mere preponderance of evidence, for it assails the validity of patents and of the judgment of a quasi-judicial tribunal empowered to render it, and neither of them could be successfully challenged without full proofs, clear, convincing, unambiguous, and entirely satisfactory to the court. *Maxwell Land Grant Case*, 121 U. S. 325, 379, 381, 7 Sup. Ct. 1015, 30 L. ed. 949; *Colorado Coal Co. v. United States*, 123 U. S. 307, 317, 8 Sup. Ct. 131, 31 L. ed. 182.

“ The only evidence the plaintiffs produced was the affidavit of Mr. Merrick, verified February 25, 1915, more than thirteen years after the event, that in May, 1901, he was a clerk and employe of the Dawes Commission, that on May 23, 1901, he ‘listed for enrollment as a citizen by blood of the Creek Nation, the name of Thomas Atkins who is enrolled opposite roll number 7913 of the final roll of the Commission and on census card No. 2707, field No. 2774, a true copy of which census card is hereto attached and made a part of this affidavit,’ that the evidence which induced him to list Thomas Atkins was ‘the authenticated 1895 roll of Creek citizens, which said

roll was used and relied upon by said Commission and by myself as the representative of said Commission in enrolling the name of Thomas Atkins.' The census card recorded these facts: That Thomas Atkins was a Creek Indian of half blood 10 years of age, that he was enrolled on the authenticated Creek tribal roll of 1895 as of Euchee township, under the name Thos. Atkins, No. 213, and that on that roll Minnie Atkins was recorded as his mother, and a white man as his father. Mr. Merrick further deposed that he had searched and found in the office of the Dawes Commission, where all such matters are kept, no memorandum or notation indicating that evidence or information was had or received by the Commission on the question whether Thomas Atkins was living or dead on April 1, 1899, and that he had no recollection of any such evidence or information had or received by himself, although somebody—who it was he said he could not recall—gave him information as to about the time of alleged birth and parentage of the said Thomas Atkins, that the final roll of citizens by blood of the Creek Tribe 'was made up from the said census card under my personal supervision and compared and reviewed by some member of the Commission, and the enrollment thus made was approved by the Secretary of the Interior on March 28, 1902.'

" On the other hand, Mr. Lyons, a witness called on behalf of the defendant, personally appeared before the court and testified that he had a conversation with Mr. Merrick in which the latter called attention to the fact that the census

card of Thomas Atkins showed his parentage, his mother and his father, that he could not have got that from the 1895 roll, and Lyons testified that Merrick said that he was satisfied from that fact that there must have been evidence on that question, and that there must also have been evidence or information of some character, which was not made of record, that Thomas Atkins was living on April 1, 1899, and further that he had no independent recollection of the whole matter, except that the enrollment was made in his handwriting. Mr. Lyons was cross-examined by counsel for the plaintiffs and testified that Mr. Merrick said that they must have had information as to the parentage probably from the 1895 roll, and he said also that they must surely have had information as to whether or not he was alive or dead on April 1, 1899, or they would not have enrolled him. Mr. Merrick's testimony was an *ex parte* affidavit introduced two days before Mr. Lyons testified in open court, and Mr. Merrick was not called to deny that Mr. Lyons' statement of his admissions was correct.

“ By the Act of June 10, 1896, the Dawes Commission was authorized to hear and determine applications for citizenship in any of the Five Civilized Tribes. By that act the rolls of citizenship of those tribes as then existing (and the Creek rolls of 1890 and 1895 were then existing), were confirmed and the Dawes Commission was commanded in determining applications for citizenship to ‘give due force and effect to the rolls, usages, and customs of each of said nations or tribes.’ 29 Stat. 339, c. 398, par. 3.

By the Act of June 7, 1897 (30 Stat. 84, c. 3), the term 'rolls of citizenship' as used in the Act of June 10, 1896, was construed to mean 'the last authenticated rolls of each tribe which have been approved by the council of the nations and the descendants of those appearing on such rolls,' and certain other persons specified that had been lawfully added thereto. By the Act of June 28, 1898 (30 Stat. 502, c. 517, Sec. 21), the Commission was authorized and directed to take the roll of Cherokee citizens of 1895 and to enroll all those living found on that roll and certain other persons specified, and 'to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud, or without authority of law, enrolling such only as may have lawful right thereto and their descendants born since such rolls were made.' That act further provided that:

“ ‘Said Commission shall make such rolls descriptive of the parties thereon, so that they may be thereby identified, and it is authorized to take a census of each of said tribes’ (hence the authorized census card in this case), ‘or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes.

• • • The rolls so made when approved by the Secretary of the Interior shall be final, and the persons whose names are found thereon, and their descendants thereafter born to them, with such persons as may in-

termarried according to tribal laws, shall alone constitute the several tribes which they represent.'

" The Act of March 1, 1901 (31 Stat. 869, c. 676, Sec. 28), provided that all citizens who were living on the 1st day of April, 1899, entitled to be enrolled under the Act of June 28, 1898, should be placed upon the rolls. The Act of June 28, 1898, was not simply an Act of Congress. It embodied and ratified the agreement between the Creek Nation and the United States, which was shortly after ratified by the Creek Nation, that the Dawes Commission should make the final roll of the latter's citizens, that for that purpose the Commission should have access to all its rolls and records, and that it might take a census of the nation or adopt any other means by the Commission deemed necessary to enable them to make such rolls. Among the rolls and records of the Creek Tribe, duly authenticated by the approval of the Creek Council, was a roll of citizens made by the tribe in 1890, another made in 1895, the pay roll of that nation for the year 1895, upon which a per capita payment was made to the citizens of the tribe. On the roll of 1890 appeared 'Minnie Atkins (Thos. and Mary, 2 children).' On the roll of 1895 appeared the names of Minnie Atkins and Thomas Atkins and the receipt of Minnie Atkins for a payment to herself and also for a payment of a like amount to her as the per capita payment due to her son Thomas Atkins.

" The Creek Tribe was a civilized and intelligent people governed by laws made by its own

Creek Council which was composed of two bodies, the House of Kings and the House of Warriors, under whose direction the census of its citizens and its rolls of citizenship were made. Noah Gregory testified that in 1889 and 1890, he was town king of Euchee township and a member of the House of Kings, that under the direction of the Creek Council, and as such town king, he made the original census roll of Euchee township, that after he made up this original census roll he reported it to the Creek Council, that the Creek Council appointed a committee of 16 from its membership, which investigated, purged, and corrected that roll and the rolls of the other towns, some 48 in number, then reported the corrected roll to the House of Kings and to the House of Warriors, and that each house separately approved and adopted it, and this roll thus made is the Creek roll of 1890, that he was a member of the House of Warriors when the roll of 1895 was made, and that it was approved by both houses. Mr. Gregory testified that after he had made up the original census roll of Euchee township for the enrollment of 1890, he called a convention of the people of that township, that the name of each one of those placed upon the original census roll by him was read out in the hearing of this convention, and with the assistance of suggestion and information made at the convention this original census roll was corrected, and that it was this corrected roll that he reported to the Creek Council, that on his original census roll under No. 26 were written 'Minnie Atkins, two children, female,' that

the word 'female' referred to Minnie Atkins, that on the list which he reported to the council, after the town meeting had purged and corrected it, as his original census roll there appeared 'No. 22, Marina Atkins and two children, No. 23, Thomas Atkins, No. 24, Mary Atkins,' that at the request of the Dawes Commission he examined the list of those the Commission proposed to enroll as Creek citizens from Euchee township in 1901 and 1902, including Minnie Atkins and Thomas Atkins, obtained what information he could concerning them and reported to the Commission regarding that list, that some on the tentative list he discovered had died before April 1, 1899, and he reported that fact to the Commission, together with any other relevant fact he discovered, but that he does not recollect all that he learned or all the information that he gave, that if he had learned that Thomas Atkins was not living on April 1, 1899, he would have reported, as he did regarding others that were on the tentative list of the Commission, that he died before April 1, 1899, but that he made no such report.

" As the Commission was required by the Acts of Congress to give full force and effect to the authenticated tribal rolls, the usages and customs of each tribe and was by those acts given access to all their rolls and records, the Creek Rolls of 1890 and 1895, on each of which Minnie Atkins and Thomas Atkins as her son were enrolled as citizens of the tribe by blood, constituted not only *prima facie*, but, in the absence of strong and persuasive countervailing proof, con-

clusive evidence before the Commission of the right of Thomas Atkins to enrollment as a citizen of the Creek Tribe. In the face of this record counsel for the plaintiffs no longer contend in this court, as they pleaded in the court below, that 'no evidence of any character was produced before, or had or obtained by said Commission with respect to the right of the alleged Thomas Atkins under said Act of Congress to be so enrolled,' but they now argue that, although all the evidence and information disclosed above was before the Commission, there was no evidence before them that Thomas Atkins was living on April 1, 1899. The answer is, *first*, that the testimony of Merrick and Lyons tends to show that Merrick, who made the census card, had information that he was living before making that card, and made it in reliance upon such information; and, *second*, that the authenticated Creek roll of 1895 was conclusive evidence that he was living in that year, and, in the absence of any direct evidence before the Commission that he had died, or that he had been in such a dangerous situation that men of reasonable prudence would infer that he had died, prior to April 1, 1899, the conclusive legal presumption was that he continued to live for at least seven years after the making of the Creek roll in 1895, and hence that he was living on April 1, 1899. In the absence of proof of earlier death, or of evidence of unusual danger of such earlier death, the legal presumption is that a live person continues to live for at least seven years. *Fidelity Mutual L. Ass'n v. Mettler*, 185 U. S. 308, 316, 22

Sup. Ct. 662, 46 L. ed. 922; *Montgomery v. Bevans*, 1 Sawy. 653, 17 Fed. Cas. 628 No. 9735; *N. W. Mutual Life Ins. Co. v. Stevens*, 71 Fed. 258, 260, 18 C. C. A. 107, 109; *The San Rafael*, 141 Fed. 270, 278, 72 C. C. A. 388, 396; *Executors of Clarke v. Canfield*, 15 N. J. Eq. 119, 122, 123; *Lawson on Presumptive Evidence* (4th ed.), rule 43, pages 251, 253, 255; 13 Cyc 295, 298, note 'b'.

“ So it is that all the claims and reasons for the avoidance of the judgment of the Commission and the patents, and for the appointment of a receiver and an injunction on the theory of the original bill, fell disproved by the evidence produced upon the motion for the appointment of the receiver.”

At the conclusion of the evidence on behalf of the government, the trial court rendered an opinion upon the evidence which appears in the Printed Record commencing at page 109, and reference to the fact that the government not only failed to show that there was no evidence before the Dawes Commission upon the question, Was Barney Thlocco alive April 1, 1899, but also showed by its own witnesses that there was evidence before the Commission. The opinion is as follows:

“ *By the Court:* I am going to announce my view of what the Government has sought to establish by the evidence offered in support of its contention that the Commission acted without

evidence in enrolling Barney Thlocco. Last night or yesterday evening when the court adjourned the evidence of the Government had just closed in relation to that allegation of the Government's bill that the enrollment of Barney Thlocco had been made by the Commission to the Five Tribes without any evidence whatever relating to the fact as to whether he was alive or dead April 1, 1899. The court held in a prior stage of the case that it would be necessary, first, in order of proof, for the Government to support that allegation by proof sufficient to make a *prima facie* case. Since the adjournment yesterday evening I have reviewed the evidence in this case, so far as it relates to that feature of the case. The question is: Has the Government made a *prima facie* case on that point? That is, has it by clear and convincing proof shown to the court that the Commission acted in enrolling Thlocco without any evidence whatever? If the proof, on the other hand, clearly convinces the court that it did have evidence, or if the proof is such as to leave the court's mind in a state of doubt as to whether there was evidence or not, in my judgment the Government has failed to establish that *prima facie* case. I have examined, as I say, the evidence of all these witnesses, Mr. Merrick, Mr. Hastain, Mr. Hopkins, Mr. Bixby and Mr. Lieber in particular. Mr. Merrick's testimony in view of the fact that he himself made the card, probably affords the court the most direct light upon the controversy. A very significant feature of the case as developed by Mr. Merrick's testimony and as developed by a

comparison of the census card as made by him on May 24, 1901, with the old census card is this: That whereas the evidence differs that in other instances, a greater or less number of instances, the census cards which were made on that date and on the prior days in May were made from the tribal rolls and the census card, in this case it clearly develops that the census card which Mr. Merrick made must have been made on evidence outside of and in addition to the rolls and the old census card, for the reason that the age of Barney Thlocco and his post-office address is given as different from that which appeared on the census card. It follows, therefore, that as to those particular statements there must have been before Mr. Merrick evidence in addition to that contained in the documents to which I have referred. It doesn't follow as a matter of positive conclusion that that evidence affected the question as to whether Barney Thlocco was living or dead April 1, 1899, but it does show that Mr. Merrick in the case of that card didn't just follow the rolls and the old census card and take no further evidence whatever. There must have been before Mr. Merrick some investigation outside of those documentary features. The evidence is clear here that at the time these cards were made up, Barney Thlocco's as well as the others, the Commission with its large force was there securing as far as it could evidence sufficient to enable it to complete these census cards which were to become the basis of the schedules which would finally be forwarded to the Secretary for his approval and make up the roll. There

was the tribal council in session, the Town Kings were there. The evidence clearly shows that they had access to the Town Kings, that they had parties out bringing in evidence. That the evidence in enrolling the Creeks was largely, almost entirely, except in contest cases, oral and not made a matter of record, so that unfortunately we have not now here any record to show what was before the Commission, but in view of that and in view of the evidence here the court can't say as a fact—can't find as a fact—that there was no evidence before the Commission on that day or that there was no evidence at some subsequent time pursuant to investigation which the Commission made, and made before the schedule was made up and forwarded to the Secretary, can't find as a fact from the evidence in this case in my judgment that there was no such evidence. There has been offered in evidence here and permitted to become a part of the record the proceedings of October 16, 1903, which appears to have been in the course of an examination with regard to certain unaccounted for Creeks, a great number of them. It appears that when the Town King was being examined that he was questioned with regard to Barney Thlocco's name on the roll and he speaks of him as Barney Thlocco on the 1890 roll. As Barney on the 1895 rolls. He is asked with regard to his death in relation to the burning of a certain hospital or house of some character. There is evidence that that is a circumstance to show that that was the investigation, and the only investigation which the Commission ever made with

regard to the question of Barney Thlocco's existence on April 1, 1899. That was permitted as a circumstance, but when considered in connection with the evidence of Mr. Merrick, Mr. Hastain, Mr. Bixby and Mr. Hopkins with regard to the manner in which this enrollment was handled, the statement of these gentlemen, offered by the Government, their positive statements that there must have been evidence with regard to Barney Thlocco's existence April 1, 1899, or his name would not have been forwarded for enrollment; in view of those statements the court cannot find that this evidence clearly and convincingly establishes the fact that there was no evidence prior to the time the schedule was forwarded. If that is true as I view the province of this Commission, it was made an agency of the Government to determine the question of Barney Thlocco's right to enrollment, and when that question was determined and the questions of fact determined by that Commission necessary to establish his right to enrollment, those questions of fact when the enrollment is approved by the Secretary of the Interior stand as determined for all time, in all courts until they are attacked because of having been based upon fraudulent testimony or having been arbitrarily found without any testimony. I may be wrong. I have heard arguments for two days in this matter. Of necessity counsel on the contending side disagree, but that is my judgment in the matter, and in view of the prior holding of the court and in view of the conclusion which I reach from this evidence, in my judgment, the Government has

failed to establish the *prima facie* case with regard to the lack of evidence as to the existence of Barney Thlocco April 1, 1899, and, therefore, is not permitted to now inquire into the fact as to whether or not he was in fact living."

Manner of Enrollment Adjudicated as Well as Right to Enrollment.

In the case of *Nunn v. Hazelrigg*, 132 C. C. A. 474, 216 Fed. 330, the Circuit Court of Appeals for the Eighth Circuit held: "When the Commission found * * * a person was entitled to enrollment *the manner in which he was found to be entitled to such enrollment was adjudicated* as much as the mere fact of the right of enrollment. The cases are so numerous that it will be useless to stop to cite them." (Italics ours.)

The Court Will Not Consider the Extent of Investigation by Commission.

The courts will not inquire as to the extent of the investigation and knowledge of the Commission on the points decided by the Commission nor inquire as to the methods by which the Commission reached their determination. As was said in DeCambra v. Rogers, 189 U. S. 119, 47 L. ed. 734: "It is hardly necessary to say that when a decision has been made

by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided or as to the methods by which he reached his determination.” Upon the same point, in *Orchard v. Alexander*, 157 U. S. 372, 39 L. ed. 737, it was said: “But the grant of power to the local officers was not limited by the manner in which they exercised that power and does not rest at all upon the kind of evidence upon which they act.” This court has held that the courts cannot *weigh* the evidence before a land department of the government.

As to Order of Proof.

The trial court correctly held that the government must first prove that there was no evidence before the Commission before a retrial of that issue. In *Goings v. Chapman*, 18 Ind. 194, the correct rule as to order of proof in such a matter is stated thus:

“ Generally the order of time for the introduction of evidence to support the action or defense must be left to the discretion of the party who introduces the evidence. But where a previous fact is necessary to be proved to render the offered evidence at all relevant, such fact must be first proved.”

F.

The presumption is that there was evidence to support the Commission's finding.

—*United States v. Iron Silver Min. Co.*, 128 U. S. 673, 32 L. ed. 571;

Colorado Coal Co. v. United States, 123 U. S. 307, 31 L. ed. 182;

James v. Germania Iron Co., 46 C. C. A. 476, 107 Fed. 597.

In *United States v. Iron Silver Min. Co.*, *supra*, the Supreme Court said:

“ The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the government charged with the alienation of public lands can only be overcome by clear and convincing proof.”

In *James v. Germania Iron Co.*, *supra*, the court said, with reference to the decision of the Land Department:

“ It comes here with the presumption of soundness and with the burden on the appellants to show it is error.”

G.

The burden is upon the complainant, however difficult the undertaking, to prove a negative.

—*Maxwell Land Grant Case*, 121 U. S. 325, 379, 30 L. ed. 949;

Colorado Coal & Iron Co. v. United States, 123 U. S. 307, 31 L. ed. 182;

Durango Land & Coal Co. v. Evans, 80 Fed. 425;

James v. Germania Iron Co., 107 Fed. 597;

Folk v. United States, 233 Fed. 177.

In *Colorado Coal & Iron Co. v. U. S.*, *supra*, the Supreme Court said, with reference to the character and degree of proof necessary to impeach the judgments of the Land Department:

“ We have had recent occasion to consider the question of the character and degree of proof necessary in such cases to invalidate titles held by purchasers in good faith for value and without notice, under patents issued by the United States. In the *Maxwell Land Grant* case, 121 U. S. 325, 379 (30:949, 958), it is said: ‘The deliberate action of the tribunals to which the law commits the determination of all preliminary questions, and the control of the processes by which this evidence of title is issued to the grantee, demands that, to annul such an instrument and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to

the court, and that the case itself must be entirely within the class of causes for which such an instrument may be avoided. * * * We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidence of title emanating from the government of the United States under its official seal? In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, shall be de-

pendent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.'

" It thus appears that the title of the defendants rests upon the strongest presumptions of fact which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing, and unambiguous. *The burden of producing these proofs and establishing the conclusion to which they are directed rests upon the government. Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish.*" (Italics ours.)

H .

The judgment of the Commission may be rebutted only by full, clear, convincing and unambiguous proof that there was no evidence before the Commission to sustain its finding.

Not only was the burden upon the government to prove a negative, but it cannot recover without clear, convincing and unambiguous proof of that negative, as was held in the *Maxwell Land Grant* case, *supra*. How did the government meet this burden? The Commissioner to the Five Civilized Tribes who enrolled Barney Thlocco and transmitted the enroll-

ment to the Secretary of the Interior for approval and the enrolling clerks who assisted the Commission, were produced by the government and testified both upon direct and cross-examination, that there was an investigation of the question whether Barney Thlocco was alive April 1, 1899; that such was the practice of the Commission, and that in no case was a name recommended for final approval by the Secretary without evidence—in short, the complainant offered in support of the bill exactly the same evidence that the defense must have offered if the government had made a showing such as to impeach the judgment of the Commission and Secretary. The government has never prevailed under the same like circumstances. Not only was there an utter failure of proof to support the bill, but the complainant showed most clearly and convincingly that the hearing in the case of Barney Thlocco was regular, according to the approved practice in the department and that the finding was made upon substantial evidence.

I.

The jurisdiction of the Commission was analogous to the jurisdiction of the Land Department in the Government in land cases.

—*Wallace v. Adams*, 74 C. C. A. 540, 143 F. 716.

It has been held so often that the jurisdiction

the Commission to the Five Civilized Tribes and the Secretary of the Interior and the effect of their action in an enrollment matter, are the same in effect as the jurisdiction and effect of the action of the Land Department of the United States in the disposition of public lands within its control, that it would appear that no authority is necessary to support the proposition.

In *Wallace v. Adams, supra*, in defining the jurisdiction of the Commission to the Five Civilized Tribes, commonly known as the Dawes Commission, it is said:

“ *The jurisdiction of the Commission and of the Secretary and the effect of their action in the allotment of lands of the Choctaw and Chickasaw Nations are the same in effect as the jurisdiction and effect of the action of the Land Department of the United States in the disposition of the public lands within its control. The Commission under the direction of the Secretary constitutes a special tribunal vested with the judicial power to hear and determine the claims of all parties to allotments of these lands and to execute its judgments by the issue of the allotment certificates which constitute conveyances of the right to the lands to the parties who it decides are entitled to the property. This tribunal undoubtedly has exclusive jurisdiction to determine such claims and to issue such a conveyance. The allotment certificate when issued, like a patent to land, is dual in its effect. It is an ad-*

judication of the special tribunal empowered to decide the question that the party to whom it issues is entitled to the land and it is a conveyance of the right to this title to the allottee."

The jurisdiction of the Commission in the allotment of lands in the Creek Nation was the same as in the tribes above referred to in *Wallace v. Adams*.

J.

The Commission was authorized "to detail clerks to aid in the performance of their duties" and "to use every fair and reasonable means within their reach" for the purpose of making the final rolls. If the Commission had enrolled Thlocco upon evidence heard by a clerk the enrollment nevertheless would have been *quasi-judicial* and not merely administrative. But the Commission as a body "thoroughly examined the evidence" and from the evidence enrolled Thlocco.

It is stated in the certificate by the judges of the Circuit Court of Appeals that the enrollment of Thlocco was purely administrative and not judicial. We shall show, *first*, that viewed as a statement of fact this is error, and *second*, that viewed as a statement of law it is in open conflict with many decisions of this court. The Commission as such thoroughly

examined the evidence and passed upon the same judicially. The Commissioners, under date of March 3, 1902, in the matter of the enrollment of Barney Thlocco and others, certified to the Secretary of the Interior (Print. Rec., p. 96): "The Commission after having thoroughly examined the rolls of the Creek Nation and such evidence as has been submitted touching the identification of the persons on roll herewith submitted, is of the opinion that all are entitled to enrollment as Creek citizens by blood and should be so enrolled." This judgment was signed by the Commission to the Five Civilized Tribes and by each of the Commissioners. Mr. Bixby, former Chairman of the Commission, who was present superintending the work of the enrolling party at Okmulgee when the name of Barney Thlocco was listed for enrollment, a witness upon behalf of the government, testified (Print. Rec., p. 97) that the Commission in the case of every enrolled citizen, including that of Barney Thlocco, made a complete and perfect investigation and that the Commission was satisfied from evidence taken that each and every one enrolled was entitled to citizenship. He further testified that some members of the Commission at some place and by evidence outside of the rolls personally investigated the right of each person for enrollment, saying: "I know; I was on the job all the time and I was satisfied that every one on the rolls was entitled

to be on the rolls.” The chairman further testified that when he was in charge of the enrolling party at Okmulgee upon the occasion of Barney Thlocco’s enrollment, there were appearing before him almost constantly prominent men of the Creek Nation, heads of the different towns and town kings, who were giving information as to the rights of citizens to be enrolled and as to whether or not they were living on the first of April, 1899. Continuing, the witness said that he was continually surrounded by persons informing them on that point; that he was getting all the information he could from every source. The enrolling clerk Merrick testified that when he listed Barney Thlocco for enrollment and completed his card at Okmulgee that he must have done so upon evidence and upon the question, Was he alive April 1, 1899. The witnesses also testified that after the return of the enrolling party from Okmulgee to Muskogee a further investigation was continued until the Commission was satisfied in each particular case that witnesses appeared before the Commission at Muskogee and that field parties were sent out to gather and bring evidence to the Commission. The chairman testified, in part, as follows: “Both before and after May 24, 1901, we were investigating all the time as to those persons whose names we listed on incomplete cards. I have no doubt but what we would subsequently conduct an investigation as to those

whose cards were incomplete or as to the particular ones we then listed as unaccounted for, not as to them only but we investigated all the time everybody that there was any doubt about." (Print. Rec., p. 100.) Answering a question as to the meaning of the Commissioners' certificate to the Secretary of the Interior above referred to, the chairman said that the *Commission* was satisfied that every one of the men enrolled were entitled to enrollment. Note that the Chairman of the Commission did not limit this finding to any particular member of the Commission, but expressly stated that the *Commission* was satisfied in each case. The Commission understood they were passing judgment judicially in these matters, as will appear at pages 6 and 7 of the Annual Report of the Commission to the Secretary of the Interior filed October 3, 1898, where the Commission said, in discussing the various Acts of Congress requiring the Commission to make correct rolls of the tribes, eliminating from the tribal rolls such names as should be stricken therefrom: "*This compels the Commission to pass judicial judgment upon the right to citizenship of every name upon the citizenship roll of each of the five tribes. No clerk or other substitute can do this work. It must be done personally by the Commission and upon a hearing of evidence in each case where there is any question.*"

Nowhere in the record does it appear that the Commission did not sit as a body to determine the case of Barney Thlocco. If the law required the Commission to so sit, the presumption is that it did do so. If the Commission was required to sit in a body to pass on the case, having certified as a part of Thlocco's enrollment record that they, all the Commissioners, had considered the case and had determined it upon the evidence, the burden was upon the government to impeach the certificate of the Commissioners, if, indeed, it could be done. Nowhere does the record show that witnesses did not appear before the Commission as such and testify in the case of Barney Thlocco. They may have done so. If this was required, the presumption is that it was done. How diligent the Commission was in these matters specially appears in the 9th Annual Report for the fiscal year ended June 30, 1902, commencing at page 32, and in the 10th Annual Report for the fiscal year ended June 30, 1903, at pages 28 and 29.

But we maintain that if only an enrolling clerk heard the evidence, reported his conclusions to the Commission and that the Commission adopted his judgment as their own, this was a compliance with the law.

At section 20 of the Act of June 28, 1898, there is a provision authorizing the Commission to detail competent clerks to perform their duties, as follows:

“ That the Commission hereinbefore named shall have authority to employ, with approval of the Secretary of the Interior, all assistance necessary for the prompt and efficient performance of all duties herein imposed, including competent surveyors to make allotments, and to do any other needed work, *and the Secretary of the Interior may detail competent clerks to aid them in the performance of their duties.*”

The Act of June 10, 1896, 29 Stat. 321, provides :

“ In the performance of such duties said commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of said territory, *and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong,* and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes.”

There are various other sweeping provisions committing this entire matter to the judgment of the commission not only in matters of substance but of

procedure. The two sections of law above quoted are sufficient for the point, the one authorizing the Commission to employ clerks and delegate to the clerks the performance of the duties of the Commissioners, the other authorizing the employment of "every fair and reasonable means." Perhaps Congress realized that it was quite impossible for the Commissioners as a body to hear all the evidence, and therefore provided that clerks might be employed to aid the Commissioners in the discharge of their duties. Certainly said clerks had powers analogous to masters in chancery or referees. They could hear evidence, report the facts, make conclusions, and the Commission might lawfully adopt their conclusions.

The contention that the enrollment of Thlocco was purely administrative and not *quasi*-judicial, viewed as a statement of law is in conflict with the following and many other authorities:

St. Louis Smelting Co. v. Kemp, 14 Otto. 104, U. S. 636, 26 L. ed. 875, 876;

Noble v. Union River Log. Co., 147 U. S. 165, 37 L. ed. 123, 127;

United States v. Hitchcock, 190 U. S. 316, 47 L. ed. 1074;

Orchard v. Alexander, 157 U. S. 372, 39 L. ed. 737;

Lytle v. State of Arkansas, 9 How. 315, 13 L. ed. 153;

Kimberlin v. Commission to the Five Civilized Tribes, 44 C. C. A. 109, 104 Fed. 653;

Nunn v. Hazelrigg, 132 C. C. A. 474, 216 Fed. 330;

Malone v. Alderdice, 129 C. C. A. 204, 212 Fed. 668;

Folk v. United States, 233 Fed. 177.

In the case of the land department of the government, it has been held that the finding is none the less *quasi-judicial* and no less conclusive because of the fact that the land officers were not present when the proof was taken. Such is the case of *Lytle v. State of Arkansas*, 9 How. 315, 13 L. ed. 153, 160, where it was said:

“ The law did not require the presence of the land officers when the proof was taken, but, in the exercise of his discretion, the Commissioner required the proof to be so taken. Having the power to impose this regulation, the Commissioner had the power to dispense with it, for reasons which might be satisfactory to him.”

In *St. Louis Smelting Co. v. Kemp*, 14 Otto. 104 U. S. 636, 26 L. ed. 875, 876, this court said, in speaking of the land department:

“ In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function and therefore it has been held in various instances by this court that their judgment as to matters of fact properly determinable by them is conclusive when brought to notice in a collateral proceeding; their judgment in such cases is like that of other special tribunals upon matters within their exclusive jurisdiction unassailable except by a direct proceeding for its correction or annulment.”

In *Noble v. Union River Logging Co.*, 147 U. S. 167, 37 L. ed. 127, this court held that a decision by the land department similar to that passed upon by the Commission in this case was judicial and not merely administrative.

The question whether the finding of the Dawes Commission was administrative purely or *quasi-judicial* does not depend upon the extent of the inquiry made by the Commission, for, as was held in *DeCamba v. Rogers*, 189 U. S. 119, 47 L. ed. 734, where a similar decision by the Secretary of the Interior was involved:

“ It is hardly necessary to say that when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as

to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination.”

In *United States v. Hitchcock*, 190 U. S. 316, 47 L. ed. 1074, 1078, this court said, in a matter similar to that here involved:

“ Congress has constituted the land department under the supervision and control of the Secretary of the Interior a special tribunal with judicial functions to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands.”

In *Orchard v. Alexander*, 157 U. S. 372, 39 L. ed. 737, it was said:

“ But the grant of power to the local officers is not limited by the manner in which they exercise that power and does not rest at all upon the kind of evidence upon which they act. Their adjudication must be final in all cases or it is final in none. The approval of the evidence offered in respect to settlement and improvements is only *quasi-judicial*. It is as much an administrative as a judicial act.”

There are many other authorities to the same effect. It has been held from the first that the enrollment of citizens of the Five Civilized Tribes is analogous to the findings of the land department of

the government and that such enrollment by the Commission is not merely administrative but *quasi-judicial*. The government has taken the untenable position that the courts have general supervisory power over the Commission by which to control their decisions upon questions within their jurisdiction. This has never been the law, and to so announce now would lead to endless confusion. This court said, in *United States v. Hitchcock, supra*:

“ The court has no general supervisory power over the officers of the land department by which to control their decisions upon questions within their jurisdiction.”

K

The Creek Nation was represented by an attorney and by head men of the tribe at the time of Thlocco's enrollment. If the hearing was *ex parte* it was such only as to the heirs and not as to the government or the Creek Nation.

It is suggested that the hearing in the case of *Barney Thlocco* was *ex parte* and that the rule announced in *United States v. Minor*, 114 U. S. 233, 29 L. ed. 110, applies. This is an entirely different case. There it was held that where by fraud or imposition on the government officers a claimant has procured public land upon a showing made entirely

ex parte by and upon the side of the person who works the imposition upon the government officers, that the United States may show in a direct attack to set aside patent the fraud *intrinsic* in the hearing before the department. Minor invoked the case of *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93, in which it was held, the case being contested, that the unsuccessful party could complain of fraud only when it was *extrinsic* to the hearing. In the *Minor* case the court showed that the *Throckmorton* case had no application because Minor had procured his title by his own fraudulent acts, *the government not having undertaken any investigation in the matter at all, no agent of the government having been upon the ground to examine the land in question, and the whole case turning upon the affidavit furnished by Minor as to the land.* But the case of *United States v. Minor* has no application in this case because the government, through its officers, acting upon behalf of the Creek Nation, took the initiative, and if the proceeding must be regarded as *ex parte* it was so because the government sought and procured the only evidence that was before the Commission. The rule in the *Minor* case, therefore, would bar the government, which participated in that hearing, from proceeding against the enrollment except for *extrinsic* fraud, as was held in the *Throckmorton* case.

**Creek Attorney, Creek Commission and Town Kings
All Present at Thlocco's Enrollment.**

The Creek attorney was present at Okmulgee when Barney Thlocco's name was listed for enrollment. (R., 77, 84.) The Creek Commission, composed of head men of the tribe whose business it was to carefully safeguard the interest of the tribe, were present and participating. (R. 77, 93). The Town Kings and Warriors, who constituted the two branches of the Creek legislative body, were present aiding and assisting the Commission. These Kings and Warriors, and other persons, appeared almost constantly before the Commission giving evidence as to the Creeks not accounted for until that hearing. (R. 86). Practically the entire force of the Commission was at Okmulgee investigating, hearing evidence and enrolling those who were accounted for, completing the roll card, as in the case of Thlocco, where they were entirely satisfied from the evidence and tentatively enrolling those about whom they were not entirely satisfied, holding such tentative roll cards for subsequent investigation. (R., 76, 94.)

It cannot be said that the hearing was *ex parte* as to the Creek Nation or the government, because the Creek Nation was represented by its attorney,

by the Creek Commission, by the Town Kings and Warriors, and by the Commission itself.

In the case of *Folk v. United States*, 233 Fed. 177, there was involved an enrollment made at Okmulgee under circumstances similar to that of Thlocco. It was held by the Circuit Court of Appeals that the hearing was not *ex parte*, the court saying, relative to the presence of the Creek Attorney: "And there is the fact that under the Creek Agreement the tribe had the right to appear before the Commission and by its agent and attorney, who during all the enrollment proceedings was under retainer and salary to protect the rights of the tribe and to prevent the enrollment by the Commission of Thomas Atkins if he was not entitled thereto, and the Creek Agreement that if this was not done the roll of the Commission should be final."

The evidence is not entirely clear as to whether or not any person or persons appeared at Okmulgee to request the enrollment of Barney Thlocco, though it is entirely clear from the evidence that *a witness or witnesses did personally appear before the Commission at Okmulgee and testified with reference to Thlocco being alive April 1, 1899.* The enrolling clerk testifies that the memoranda made on that occasion shows that some one must have appeared and

given evidence on the point, but such witness or witnesses may have been produced by the Creek Nation through its attorney or through the Creek Commission. All the United States Marshal's force were scouring the country where the full-bloods lived to bring in witnesses to give evidence with reference to the right of the "unaccounted for" Creeks to be enrolled. There is no evidence, therefore, that the heirs or anyone upon their behalf requested the enrollment of Thlocco. The evidence shows quite conclusively that the witnesses testifying on the point were produced by the Commission to the Five Civilized Tribes or by some of the various representatives of the Creek Nation. We apprehend that no such investigation as this has ever been held to be *ex parte* as to the government or as to an Indian tribe.

L.

To sustain the government would be to destroy the rules of property established by the uniform decisions of the Circuit Court of Appeals for the Eighth Circuit extending over a period of seventeen years, to destroy utterly many land titles in the hands of innocent purchasers, and to cloud hopelessly many thousands of titles without so much as a forum, ex

cept at the will of the government as complainant, to test their validity.

For seventeen years, commencing with the case of *Kimberlin v. Commission to the Five Civilized Tribes*, 104 Fed. 653, the Circuit Court of Appeals for the Eighth Circuit has had uninterrupted appellate jurisdiction over the Indian Territory side of the state, and since statehood has passed upon nearly every important litigated Indian question, and since the *Kimberlin* case it has continued to declare that the Dawes Commission was a *quasi-judicial* tribunal and that its judgments and decrees were not open to collateral attack. This conclusion was reached by the Circuit Court of Appeals *whether dealing with groups of Indians or with individual cases. The action of the Commission was quasi-judicial, whether dealing with Indians as a class or dealing with the particular Indian in the matter of enrollment.* Under these holdings of the court vast property rights have grown up, and if this question is now treated as open and is decided adversely to the holdings of the Eighth Circuit, great confusion and loss will necessarily ensue. When this action was commenced counsel for the complainant realized that in order to bring themselves within the long-established decisions of the Eighth Circuit the government must allege either a mistake of law, a gross

mistake of the facts proved, or fraud. As we have shown fully elsewhere, the bill is upon the theory that there was a mistake of law, but having failed to establish the allegation that there was no evidence before the Commission as to whether or not Thlocco was alive April 1, 1899, the government now attempts to change its theory and asks the Supreme Court to strike down the decisions of the Circuit Court of Appeals for the Eighth Circuit extending over so many years. We show in another part of this brief that widespread disaster would result if these well-considered and long-accepted opinions are overturned.

The east half of Oklahoma has been burdened already with litigation almost beyond endurance. In the spring and summer of 1898 the government commenced, at Muskogee, Oklahoma, actions involving the validity of about 30,000 conveyances made by citizens of the Five Civilized Tribes, alleging no fraud but raising questions of law only. It was urged thereforcibly that this great burden of litigation was not necessary for the determination of some eighteen law questions presented by all that vast group of cases. Since the commencement of those actions almost all the points involved have been determined in favor of the defendants. It is now a matter of common knowledge that homeseekers from the other

states will hardly seriously consider the purchase of Indian land in the State of Oklahoma. This uncertainty in land titles has resulted disastrously to the Indians themselves. When their lands came on the market by removal of restrictions, or when the owners became of age, possible purchasers were few in number and very timid. It is impossible for us to believe that this court will further impair land titles in that part of Oklahoma formerly Indian Territory by striking down decisions by the Circuit Court of Appeals extending over a period of almost twenty years.

The lower court at the conclusion of the trial in this case, seeing the disastrous results of the government's contention if sustained, said:

“ In my judgment if the contention of the Government is sound it means that these thousands of allotments and patents which have been issued here upon the faith of the enrollment of the Commission to the Five Civilized Tribes of these Indians, can now be attacked and set aside by actions of this court, merely upon a showing that the Commission although finding, for instance in the case of the Creek Nation that the allottee was living April 1, 1899, made a mistake and that in as much as they made that mistake it devolved upon this court to re-try that issue. I may be wrong but as I view the law that would be a holding contrary to the law, contrary to

public policy and a holding which I cannot make in this case." (Print. Rec., 108.)

M

The government asks for the establishment of a new rule which would permit the United States in a court of equity to retry a question of fact already passed by a land department of the government without first impeaching the finding of the department upon one of the recognized grounds of attack, namely, for error of law, gross mistake of fact, or for fraud.

After much research, we are quite prepared to say that never in the history of the government have the courts announced the rule contended for by the government or anything similar to it. The government not having offered one scintilla of evidence to support the theory upon which the bill was framed, seeks a new rule both revolutionary and appalling. This court is asked to say that the judgment of the Commission is an entire nullity without the government impeaching the judgment of the Commission. This would make the court a Dawes Commission and treat the whole matter of enrollment as open.

N

The hearing in the case of Thlocco was exactly the same as in all other uncontested cases. Thlocco was "accounted for" at the hearing at Okmulgee, the capital of the Creek Nation, though subsequent investigation was made to verify the conclusion reached at the Okmulgee hearing. The presumption of continued life considered. The high points of the government's testimony showing that Thlocco was enrolled regularly, restated.

By reference to the brief abstract of the evidence at the beginning of this brief, it is entirely clear that *Thlocco was enrolled precisely as all other Indians in uncontested cases*. While he was "unaccounted for" prior to the Okmulgee hearing, he was "accounted for" at that hearing and his roll completed. He was on the 1890 roll and on the 1895 roll and enrolled on an old census card made in the year 1898, or thereabout. All these rolls were before the Commission at Okmulgee. They were required by law to give full force and effect to each of these rolls. Merrick, the enrolling clerk, completed the roll card. He and all the other witnesses upon behalf of the government who testified on this point stated that this enrollment card completed in the form in which it appears in the evidence signifies that there must have been before the enrolling party at Okmulgee

evidence showing that Barney Thlocco was alive 1899 or the card would not have been made in that form. The enrolling clerk says there must have been such evidence before him on that occasion. He further testifies that some one must have appeared before him and given testimony on that occasion as to the right of Barney Thlocco to be enrolled. The evidence further shows that there were two classes of cards made at Okmulgee; the one complete and the other incomplete, the completed cards being made only in cases where the Commission were satisfied that the member enrolled was alive April 1, 1899, the other class, incomplete cards, which were reserved for investigation upon that point; but that in both classes of cases there was subsequent investigation until the Commission became thoroughly satisfied upon all the points involved. We unhesitatingly assert that careful review of all the evidence upon behalf of the government will show conclusively that Barney Thlocco was enrolled regularly upon a hearing and upon evidence as regards all the points relating to his right to be enrolled.

Presumption of Life.

It is admitted by the government that Thlocco was alive January, 1899, and that at the time of his enrollment the various tribal rolls were before the

Commission. The presumption of law is that he lived at least seven years from and after the time last accounted for, and the burden is upon the government to show that at the hearing in the matter of Barney Thlocco's enrollment this presumption was overcome by proper proof. The tribal rolls considered, the presumption of continued life is such as to be conclusive in this case. *Folk v. United States*, 233 Fed. 177.

PROPOSITION TWO.

THE ATTEMPTED CANCELLATION OF THLOCCO'S ENROLLMENT WAS WHOLLY VOID. THE SECRETARY'S ORDER DOES NOT PURPORT TO AFFECT THE TITLE OR THE PATENTS, HE HAVING HELD EXPRESSLY THAT THE PATENTS HAD ISSUED AND HAD BEEN DELIVERED.

Counsel for the government practically concede that there is no merit in the contention that the trial court erred in excluding the evidence showing the attempted cancellation of Thlocco's enrollment. But counsel for Bissett and others contend that this act of the Secretary shifted the burden of proof.

The facts relating to the attempted cancellation of the enrollment of Thlocco appear in the letter of Commissioner Tams Bixby to the Secretary of the Interior dated October 10, 1906 (record, both Original and Print, page 59), which letter is as follows:

“ Muskogee, Indian Territory,
October 10, 1906.

“ *The Honorable, The Secretary of the Interior.*

“ Sir: August 25, 1904, the Commission to the Five Civilized Tribes transmitted to the Department a communication from the attorney for the Creek Nation in the nature of a motion to reopen the matter of the right to enrollment of Barney Thlocco, deceased, whose name is contained in a partial list of citizens by blood of the Creek Nation approved by the Secretary of the Interior March 28, 1902, opposite No. 8592. Said motion was accompanied by an affidavit executed by Wilson Knight and Barney Yahola to the effect that said Barney Thlocco died prior to April 1, 1899.

“ The Commission to the Five Civilized Tribes, in its report transmitting said motion and affidavit, recommended that the case be reopened and that a hearing be ordered.

“ September 16, 1904, (I. T. D. 7234-1904), the Department reopened said case and referring to the fact, as shown by the records of this office, that deeds Nos. 9450 and 9451 covering the

allotment selection made to said Barney Thlocco, deceased, have been issued (which said deeds were transmitted to the Principal Chief of the Creek Nation for delivery, on February 11, 1903), stated that,

“ *‘The Department does not believe that the question as to whether or not deeds have been issued to the deceased or his heirs should be considered in connection with the motion for rehearing, in as much as deeds to land constitute only a portion of the benefits incidental to Creek citizenship. If the name of the deceased appears on the roll erroneously, the error should be corrected.’*

“ July 24, 1905, this office received a communication from the Attorney for the Creek Nation withdrawing all motions to reopen Creek enrollment cases filed by him prior to the meeting of the Creek Council in October, 1904.

“ October 2, 1905, a report was transmitted to the Department in the matter of the right to enrollment of Aaron McGirt, deceased, and it was recommended in said matter that in view of the facts in the case and of the action of the attorney for the Creek Nation in withdrawing his motion to reopen same, that the enrollment of said Aaron McGirt, deceased, be allowed to stand.

“ The Department under date of November 3, 1905, (I. T. D. 14250-1905), directed that investigation be had as to the right to enrollment

of said Aaron McGirt, deceased, stating that 'It is not necessary for the Creek Nation to supply funds to investigate this matter. You are authorized to see that correct rolls of Creek citizens are made and have been furnished with the means necessary for that purpose.'

" *In accordance with instructions as above set forth, an attempt was made to locate the heirs of said Barney Thlocco, deceased, by letter and through a Creek enrollment field party, but the effort in this direction was unsuccessful.*

" Wilson Knight and Barney Yahola, upon whose affidavit said case was reopened, having died, the testimony of other witnesses was taken in this matter by the Creek field party on October 21 and November 14, 1905, neither the Creek Nation nor the heirs of said deceased being represented at said hearings.

" *A hearing in this matter was set for February 19, 1906. No testimony or other evidence was introduced on said date.*

" I am of the opinion that the testimony introduced in the later proceedings, considered in connection with the affidavit of Wilson Knight and Barney Yahola, previously submitted, conclusively establishes the date of death of Barney Thlocco as prior to April 1, 1899, and respectfully recommend that authority be granted for the striking of the name of said applicant from the approved roll of citizens by blood of the Creek Nation opposite No. 8592.

“ The complete record in the case is transmitted herewith.

“ Respectfully,

“ (Signed) TAMS BIXBY,
(Italics ours.) *Commissioner.*”

The *intention* and *scope* of the Secretary's final order in the matter appear in his letter dated December 13, 1906, record page 60, which is as follows:

“ Department of the Interior.

“ Washington, December 13, 1906.

“ *Commissioner to the Five Civilized Tribes,
Muskogee, Indian Territory.*

“ *Sir:* October, 10, 1906, you transmitted a report in reference to the right of Barney Thlocco, deceased, whose name is contained in a partial list of citizens by blood of the Creek Nation, opposite No. 8592, to enrollment as a citizen of said nation.

“ By reason of an investigation held by you, you consider that said Barney Thlocco died prior to April 1, 1899, and you therefore recommend that authority be granted for the striking of the name of said applicant from the approved roll of citizens by blood of the Creek Nation.

“ Reporting November 12, 1906 (Land 95459), the Indian Office concurs in your recommendation.

“ The Department has this day canceled the name of Barney Thlocco, opposite No. 8592, from the partial list of citizens by blood of the Creek Nation, and has requested the Indian Office to take similar action on the roll in its possession.

“ You are hereby authorized to cancel said name from the roll in your custody. *It appearing that deeds Nos. 9450 and 9451, covering the allotment selection made to said Barney Thlocco, deceased, have been issued and delivered heretofore, the Attorney General has this day been requested to take such action as he may deem proper looking to the setting aside of said instruments.*

“ Respectfully,

“ (Signed) E. A. HITCHCOCK,
(Italics ours.) *Secretary.*”

From the foregoing the following important facts appear: *That this proceeding was ex parte and wholly without notice to the heirs; that there was no hearing or trial; that the officers of the department recognized that they could not make an order affecting the allotment or the certificate there-to or the patents; that the most the department undertook to do was merely to strike off the name of Barney Thlocco from the final rolls so that his heirs might not participate in future distribution of tribal*

funds, and to refer the entire matter of the allotment certificate, the patents and the land to the Department of Justice for proper court action. The Secretary correctly held that the patent had been issued and had been delivered and therefore he had no jurisdiction to make an order affecting the title.

The case of *Garfield v. United States ex rel Goldsby*, 211 U. S. 249, 53 L. ed. 168, is altogether conclusive of the proposition that the attempted cancellation of Thlocco's enrollment was wholly unauthorized by law, without due process of law and utterly void for any purpose. Goldsby had been enrolled and had received an allotment certificate. The Secretary of the Interior received information, just as here, which convinced him that the enrollment was illegal. He struck the name of Goldsby from the final rolls without notice or a hearing, just as in this case. An application was made for mandamus to require the Secretary to restore his name to the rolls. The answer of the Secretary denied the right of Goldsby to enrollment. The case went off on demurrer to the answer. The high points of the court's opinion are these: *Goldsby acquired valuable rights by his enrollment; his allotment certificate was the conclusive evidence of his right to the land. The statutes gave the Secretary no power or authority, without notice and hearing, to strike down the rights thus ac-*

quired. His action was wholly unwarranted and void.
The court's opinion, in part, is as follows:

“ It is insisted by the learned counsel for the government that the court had no jurisdiction to entertain this suit, because the legal title has not as yet passed from the government, as no patent has passed. We have no disposition to question those cases in which this court has held that the courts may not interfere with the Land Department in the administration of the public lands while the same are subject to disposition under Acts of Congress intrusting such matters to that branch of the government. Some of these cases are cited in the late case of *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 50 L. ed. 499, 26 Sup. Ct. Rep. 282, and the principle to be gathered from them is that while the land is under the control of the Land Department prior to the issue of patent, the court will not interfere with such departmental administration. This was held as late as the case of *Love v. Flahive*, 205 U. S. 195-198, 51 L. ed. 768-770, 27 Sup. Ct. Rep. 486.

“ But the question presented for adjudication here does not involve the control of any matter committed to the Land Department for investigation and determination. The contention of the relator is, that as the Secretary had exercised the authority conferred upon him and placed his name upon the rolls, and the same had been certified to the Commission, and he had received an allotment certificate, and was in pos-

session of the lands, the action of the Secretary in striking him from the roll was wholly unwarranted, and not within the authority and control over public land titles given to the Interior Department.

“ By the conceded action of the Secretary prior to the striking of Goldsby's name from the rolls, he had not only become entitled to participate in the distribution of the funds of the nation, but, by the express terms of section 23 of the Act of July 1, 1902 (32 Stat. at L. 641, Chap. 1362), it was provided that the certificate should be conclusive evidence of the right of the allottee to the tract of land described therein. We have therefore under consideration in this case the right to control by judicial action an alleged unauthorized act of the Secretary of the Interior for which he was given no authority under any Act of Congress.

“ It is insisted that mandamus is not the proper remedy in cases such as the one now under consideration. But we are of opinion that mandamus may issue if the Secretary of the Interior has acted wholly without authority of law. Since *Marbury v. Madison*, 1 Cranch. 137, 2 L. ed. 60, it has been held that there is a distinction between those acts which require the exercise of discretion or judgment and those which are purely ministerial, or are undertaken entirely without authority, which may become the subject of review in the courts. The subject was under consideration in *Noble v. Union River Logging Co.*, 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271,

and Mr. Justice BROWN, delivering the opinion of the court, cites many of the previous cases of this court, and, speaking for the court, says:

“ ‘We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a department, under any view that could be taken of the facts that were laid before him, was *ultra vires*, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do. As observed by Mr. Justice BRADLEY, in *Board of Liquidation v. McComb*, 92 U. S. 531, 541, 25 L. ed. 623, 628: “But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other”.’

“ We think this principle applicable to this case, and that there was jurisdiction to issue the writ of mandamus.

“ In our view, this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the acts of Congress. We appreciate fully the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law. But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and, if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action.

“ In the extended discussion which has been had upon the meaning and extent of constitutional protection against action without due process of law, it has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.

“ The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to

say that its binding obligation has never been questioned in this court.

“ The acts of Congress, as we have seen, have made provision that the commission shall certify from time to time to the Secretary of the Interior the lists upon which the names of persons found by the commission to be entitled to enrollment shall be placed. Upon the approval of the Secretary of the Interior these lists constitute a part and parcel of the final rolls of citizens of the Choctaw and Chickasaw tribes and Chickasaw freedmen, upon which allotments of lands and distribution of tribal property shall be made.

“ The statute provides in section 30, Act of July 1, 1902, *supra*:

“ ‘Lists shall be made up and forwarded when contests of whatever character shall have been determined, and when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrollment, the rolls shall be deemed complete. The rolls so prepared shall be made in quintuplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Choctaw Nation, one with the governor of the Chickasaw Nation, and one to remain with the Commission to the Five Civilized Tribes.’

“ The Secretary took the action contemplated by this section and acted upon the list forwarded by the commission. The roll was made up and distributed in quintuplicate, as required by the statute. Notice was given to the Commission, and land was allotted to the relator, as provided by section 23 of the act of July 1, 1902, *supra*. The relator thereby acquired valuable rights, his name was upon the rolls, the certificate of his allotment of land was awarded to him. There is nothing in the statutes, as we read them, which gave the Secretary power and authority, without notice and hearing, to strike down the rights thus acquired.

“ Nor do we think it an answer to the petition for a writ of mandamus to say, as is earnestly contended by the counsel for the government, that *Goldsby's* case comes within the provisions of the act of July 1, 1902, establishing a citizenship court, as it appears in this record that he was one of the claimants whose judgment in the court of the Indian Territory was annulled by the subsequent procedure in the citizenship court, leaving to Goldsby the remedy of appealing himself to that court, which, having failed to do, he has lost all right to enrollment, and therefore the decision of the Secretary of March 4, 1907, striking him from the rolls, ought not to be interfered with, for the reason that the writ of mandamus, upon well-settled principles, ought not to issue to require the Secretary to do that which it now appears he never had any lawful authority to do. But we are of opinion that

the facts now adduced are insufficient to require us to say that Goldsby could not establish a right to enrollment. The government contends, and we have held, that it does not appear in this case whether Goldsby's name was on the original or other tribal rolls—a fact essential to be known in order to determine whether his contention be sound that such an enrollment gave him the right to participate in the division of the funds and lands of the nation, irrespective of the action of the Dawes Commission, the court of the Indian Territory, or the citizenship court. The question here involved concerns the right and authority of the Secretary of the Interior to take the action of March 4, 1907, in summarily striking the relator's name from the rolls. That is the question involved in this case.

“ For the reasons given we think this action was unwarranted, and that the relator is entitled to be restored to the status he occupied before that order was made.”

The later case of *United States ex rel Turner v. Fisher*, 222 U. S. 204, 56 L. ed. 165, does not in any manner impair the force of the *Goldsby* case. Turner's admissions upon the pleadings for the writ of mandamus to restore his name upon the rolls admitted that he had no right to be enrolled. It, therefore, followed that since the petitioner himself admitted that he had no right to be enrolled he could not be heard in a court of equity in an application

for a writ to restore his name. If he had not made this admission, but had asserted his right to be enrolled and had relied upon the enrollment record, as was done in the *Goldsby* case, he would have prevailed in the action.

The case of *United States ex rel Lowe v. Fisher*, 223 U. S. 95, 56 L. ed. 364 was an action for mandamus to require the Secretary to cancel his action striking the names of certain Cherokee freedmen from the approved rolls. *He had stricken their names after notice and a full hearing.* The prayer of the petition was denied on the ground that a hearing had been had. This left the petitioners in a situation where they could not participate in further distribution of the tribal funds without establishing their right thereto in an appropriate action. The Secretary's action left the allottees without patents to their lands, and possibly put upon them the burden, in an action for the patents, to show their right thereto. We are of the opinion, however, that land having been segregated from the public domain of the nation, the government could not cancel the allotment certificate except by a court action for that purpose. But that point is not here involved.

The case of *Guaranty Savings Bank v. Bladow*, 176 U. S. 448, 44 L. ed. 540, does not sustain the government or the views of counsel for Bissett and

others. It involved a homestead entry. There was a *contest* proceeding in which a mortgagee of the entryman's interest did not have notice. It was held that the cancellation of the entryman's certificate put upon the mortgagee the burden of showing that the entryman mortgagor had the right to the land. The land office has always required *notice to the entryman and a hearing before cancellation of his certificate of entry*. The rules so provide, and this court will take notice of such rules. *But the rules do not require notice to be served upon the entryman's grantee* who takes his conveyance charged with notice of whatever imperfections there may be in the title. The grantee takes his conveyance from the entryman, knowing that the departmental rules do not require notice to him of a contest. Cancellation of the entryman's certificate without notice to him or to his heirs, is, of course, absolutely void, and the authorities so hold. The entryman's certificate differs substantially from the allotment certificate. It is *prima facie* evidence only of his right to the title, as we have shown heretofore in this brief, while the allotment certificate is *conclusive* evidence of the allottee's right to the land.

In *Peyton v. Desmond*, 129 Fed. 1, 9, the Circuit Court of Appeals for the Eighth Circuit, by Judge VAN DEVANTER, now Mr. Justice VAN DEVANTER, said:

“ The power of the Land Department to review its prior rulings and to cancel existing entries is not unlimited or arbitrary (*Cornelius v. Kessel*, 128 U. S. 456, 9 Sup. Ct. 122, 32 L. ed. 482), and can be exercised only after notice to parties in interest and due opportunity for a full hearing.”

In *Noble v. Union River Logging Co.*, 147 U. S. 165, 37 L. ed. 123, 127, this court said, with reference to an attempt of the Land Department to cancel a reservation for the benefit of the railroad:

“ A revocation of the approval of the Secretary of the Interior, however, by his successor in office was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void. As was said by Mr. Justice GRIER, in *United States v. Stone*, 69 U. S., 2 Wall. 525, 535, 17 L. ed. 765, 767: ‘One officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of the court’.”

The case of *Cornelius v. Kessel*, 128 U. S. 456, 32 L. ed. 482, holds that such action by the Land Department of the government without notice is void.

Assuming, for the purposes of argument, that the Secretary was not theretofore divested of power to affect this allotment or the evidence of the defendant's title, his action was in violation of the de-

fendants' constitutional rights and wholly void for want of notice and hearing. Therefore, as the case stands, patents having been issued and delivered, the government must impeach the evidence, if at all, in the regular way.

The utmost claimed upon behalf of Bissett and associates on account of the attempted cancellation of the enrollment is that the action of the Secretary shifted the burden of proof, placing upon the heirs of Thlocco in this case the burden of showing Thlocco's right to enrollment. This contention by the government is plainly at war with the decision of this court in the *Goldsby* case, *supra*, for under that opinion the action of the Secretary was illegal, without process of law, and wholly unauthorized, justifying the court in issuing the writ of mandamus requiring the Secretary to restore the name without placing upon the petitioner the burden of showing his right to be enrolled. Thlocco's heirs, therefore, have the right, without assuming the burden of showing Thlocco's right to enrollment, to require the Secretary in an action for that purpose to restore the name of Thlocco to the rolls. The doctrine of the *Goldsby* case is that the enrolled citizen did not lose any rights by the unauthorized striking of the name from the rolls. As was held in the *Goldsby* case, the enrollment confers upon the citizen a valuable right

for it is one of the muniments of his title, just as the allotment certificate is the conclusive evidence of his title. The enrollment and issuance of the allotment certificate constitute evidence of title arising almost to the dignity and conclusiveness of the patent itself.

PROPOSITION THREE.

THE CERTIFICATE OF ALLOTMENT AND DEEDS TO THLOCCO WERE NOT NULL AND VOID BECAUSE HE WAS DEAD AT THE TIME THEY WERE MADE. THIS PROPOSITION IS NOT CONTESTED BY THE GOVERNMENT.

The government does not insist that the certificate of allotment and deeds to Thlocco were null and void because he was dead at the time they were made, but counsel for Bissett, Toxaway Oil Company, Moore and Cosden, claiming through Posey, who attempted to file on part of the land May 19, 1913, do not join the government in conceding this point.

We shall discuss the question, Were the certificate of allotment and deeds to Thlocco null and void

because he was dead at the time they were made under the following heads in the order named:

A. The fact that Thlocco died prior to June 30 1902, the date when the allotment was made in his name, is immaterial.

- (1) The provision at Section 28, Original Creek Agreement, "If any citizen has died * * * before receiving his allotment of lands and distributive share of all the funds of the tribe, *the lands and money to which he would be entitled if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly,*" is of *substance*, not mere form; the heirs taking the lands as if by *descent and as of the date of Thlocco's death and as if he had been vested with full title.*
- (2) The land did not pass by *grant*; it was received in partition or allotment, and therefore the rules governing an ordinary grant do not apply.
- (3) The Commission was required by *mandatory* acts of Congress to make *arbitrary* allotments in cases where the enrolled members did not select for themselves within a reasonable time (the privilege of selection not being accorded to the heirs). Acceptance of allotment certificate

and patents was not necessary to pass title. According to departmental practice and construction of the statutes involved, not only did the Commission have the right to make arbitrary allotments but the certificate of allotment and patent in the name of the dead allottee are valid.

- (4) This case is not analogous to an action involving patent issued to a fictitious person. The authorities cited involving patents to fictitious persons examined and found to be not in point.

B. The allotment certificate was final and *conclusive* evidence of the complete equitable title conferred upon the heirs of Thlocco by the Original Creek Agreement. The certificate, like a patent, dual in its effect, was an adjudication of the special tribunal empowered to decide the question, was Thlocco entitled to the land and was a *conveyance* of the right to full legal title.

C. Title by patent from the United States and the Creek Nation is title by *record*; and delivery of the instrument to the grantee is not essential to pass the title; therefore, when the patent was recorded upon the public records on the 11th day of April, 1903, the legal title of the land passed.

D. The Act of May 20, 1836, 5 Stat. 31, providing "that in all cases where patents for public land have been or may hereafter be issued in pursuance of any law of the United States, to a person who has died or who shall hereafter die, before the date of such patent the title to the land designated therein shall inure to, and become vested in, the heirs, devisees or assigns of such deceased patentee as if the patent had issued to the deceased person during his life," is applicable to the patents here involved.

E. Assuming that legal title had not theretofore passed, it did pass by section 5, Act of April 26, 1906, 34 Stat. 137. This land was not "involved in contest" on April 26, 1906.

F. Assuming that the legal title had not theretofore passed, it did vest in the heirs by Section 3 of the Act of June 25, 1910, 36 Stat. 863.

G. If patent to Thlocco did not pass title to his heirs as a matter of law the right thereto is equivalent to the patent and equity will do that which ought to have been done, and will decree title to the heirs.

A.

The fact that Thlocco died prior to June 30, 1902, the date when the allotment was made in his name, is immaterial.

- (1) *The provision at section 28, Original Agreement, "If any citizen has died * * * before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall DESCEND to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly," is of SUBSTANCE, not mere form, the heirs taking the lands as if by DESCENT AND AS OF THE DATE OF THLOCCO'S DEATH AND AS IF HE HAD BEEN VESTED WITH FULL TITLE.*

—Section 28, Act March 1, 1901, 31 Stat. 861;
Shulthis v. McDougal, 170 Fed. 529;
McDougal v. McKay, 237 U. S. 372, 59 Law
ed. 1001;
Mullen v. United States, 224 U. S. 448, 56
Law ed. 834;
Skelton v. Dill, 235 U. S. 206, 59 L. ed. 198;
Woodward v. deGraffenreid, 238 U. S. 284,
317-319, 59 L. ed. 1311, 1328;
Wallace v. Adams, 74 C. C. A. 540, 143 Fed.
716, 721;

Doe v. Wilson, 64 U. S. 457, 16 L. ed. 584;

Crews v. Burcham, 66 U. S. 352, 17 L. ed.

91;

Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49;

Folk v. United States, 233 Fed. 180;

Gould v. West, 32 Tex. Rep. 339, 350;

Section 20, Act July 1, 1902, 32 Stat. 716

Section 22, Act July 1, 1902, 32 Stat. 641.

Commencing with the Act of March 3, 1893 Chap. 209, 27 Stat. at L. 612, 645, Congress passed many laws with the view of breaking up the tribal relations in the Five Civilized Tribes, namely, the Creek, Seminole, Cherokee, Choctaw and Chickasaw Nations, and for the final partition and distribution of the lands and moneys of the respective tribes.

The history of this legislation in so far as it affects the Creek Nation is set forth at length in *Woodward v. deGraffenried*, 238 U. S. 282, 294, 59 L. ed. 1310, 1318. Tribal government was a failure. Many white people from the various states of the union had made their homes in these nations. Everybody concerned, the officers of the government, the white population and the Indians themselves, planned for and expected that the public domain of the respective tribes would be allotted to the respective members of the tribes; that the Indians would take on speedily all the habits and customs of their white neigh-

bors, and that statehood would be granted. At first Congress entertained some doubt both as to its right to exercise plenary power without the consent of the Indians and of the expediency of such division of the tribal property without the consent of the Indians. But by a series of authoritative decisions, it was established that Congress had the plenary power to break up the tribal relations, enroll the members of the tribe, allot the lands and distribute the moneys, giving to each enrolled member of the tribe his *pro rata* part without the consent of the Indians either in their tribal or individual capacities; and Congress continued from year to year to exercise in larger degree so much of its plenary power as was necessary to further its general scheme of allotment. Where persuasion proved ineffectual, arbitrary action was taken, always upon the theory, however, in the Creek Nation, as in the other tribes, that the Creek tribe owned the lands subject, of course, to the ultimate title in the government, (which ultimate title may be disregarded in this discussion for the reason that there was never any abandonment of the tribal lands but an allotment of the same) and always upon the theory that each enrolled member of the tribe was entitled to the same amount of land in value and money as any other member of the tribe. The names on the rolls were to be the *units* for the *final partition and distribution of all the tribal property*.

Every member of the Creek tribe found by the Commission to the Five Civilized Tribes to have been alive April 1, 1899, was entitled to receive an allotment. If dead the allottee's lands and money were to descend to his heirs. Section 28 of the Original Creek Agreement, Act of March 1, 1901, provides:

“ No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.

“ All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled ‘An Act for the protection of the people of the Indian Territory, and for other purposes,’ shall be placed upon the rolls to be made by said commission under said Act of Congress, *and if any such citizen has died* since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, *shall descend to his heirs* according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

“ All children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be

placed on the rolls made by said commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

“ The rolls so made by said commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made and to no other persons.”

In case any enrolled member of the tribe died before receiving his distributive portion of the lands and moneys of the tribe, by said Section 28 the situation was made precisely the same as if the deceased member had lived to take his allotment. Congress was not legislating at Section 28 about the *mere form of allotment certificates or patents*. The words “shall descend” must be construed with the words “and be allotted.” We do not claim that there was descent in a technical sense, but the rights of the heirs in all respects were the same as if Thlocco had been *vested* with the legal title. *The allotment upon behalf of the deceased member made in his name was a substantial compliance with Section 28.* The contention upon behalf of Bissett and others that the certificate of allotment and patent were ineffectual

because in the name of Thlocco ignores entirely the force of the words "*the lands * * * shall descend to his heirs.*" In *Shulthis v. McDougal*, 170 Fed. 529, the Circuit Court of Appeals for the Eighth Circuit said on this point:

" These kinsmen got all their right to additional lands under and through the enrolled member who had died. Whether the ancestor was actually seised of the property or not in his lifetime, was immaterial. It was the intent of the statute that the property should pass by the same right and in the same manner that it would have passed if the person enrolled had survived to receive his allotment. The tribe was not bestowing said land as a bounty, but was simply providing for the right of inheritance.

" Congress itself has construed this statute. Section 5 of the act (Act April 26, 1906, c. 1876, 34 Stat. 138) provides:

" 'That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued, shall issue in the name of the allottee; and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs; and in case any allottee shall die after the restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had is-

sued to the allottee during his life; and all patents heretofore issued where the allottee died before the same became effective, shall be given like effect.'

" Here is an express declaration by Congress that the land shall descend to heirs the same as it would have descended if the patent or deed had issued to the allottee during his life, and it is declared that allotments for allottees who have died shall also thus descend. This interpretation by Congress of its own act leaves no room for doubt as to its intent."

The doctrine of the *Shulthis* case was fully approved by this court in *McDougal v. McKay*, 237 U. S. 372, 59 L. ed. 1001.

The general scheme of allotment was the same in the Five Civilized Tribes. In the Cherokee, Choctaw and Chickasaw tribes the basis of the enrollment was the same, but it was expressly provided that allotments upon behalf of deceased members of the tribes should be made in their names and that patents should issue; while in the Seminole and Creek Nations the form in which the certificates and patents should issue was not expressly provided. Allotments upon behalf of deceased members by the general scheme of allotment were made in substantially the same manner in all the tribes.

—Cherokee Treaty of July 1, 1902, Act of July 1, 1902, 32 Stat. 716, Section 20;

Choctaw-Chickasaw Treaty, Act of July 1,
1902, 32 Stat. 631, Section 22;

Seminole Treaty of June 2, 1900, 31 Stat.
250, Section 2.

Whether the allotment was made in the name of the deceased member of the tribe or directly to his heirs, it was, in every case, the allotment of the deceased member and his heirs received it as if by descent and not otherwise, and in all cases as of the date of the death of their ancestor.

The case of *Mullen v. United States*, 224 U. S. 448, 56 L. ed. 834, is conclusive upon this point, for it was held in this case that there is no *substantial* but only a *formal* distinction between the case of an allotment for the benefit of a deceased member made in the name of the deceased and such an allotment made to the heirs. The court said, in the opinion by Mr. Justice HUGHES:

“ The question now presented—with regard to the conveyances made to the appellants—arises in the second class of cases; that is, where a person whose name appeared upon the rolls died after the ratification of the agreement and before receiving his allotment. In this event, provision was made for allotment in the name of the deceased person, and for the descent of the lands to his heirs. This is contained in paragraph 22 of the Supplemental Agreement:

“ ‘22. If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution, as provided in chapter forty-nine of Mansfield’s Digest of the Statutes of Arkansas: *Provided*, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted.’

“ In the cases falling within this paragraph, there is no requirement for the selection of any portion of the allotted lands as a homestead, and there is no ground for supposing that it was the intention of Congress that a provision of such selection should be read into the paragraph, so as to assimilate it to paragraph 12, relating to allotments to living members. While the lands were to be allotted in the name of the deceased allottee, they passed at once to his heirs, and as each heir, if a member of the tribe, was already

supplied with his homestead of 160 acres, there was no occasion for a further selection for that purpose from the inherited lands. No distinction is made between the heirs; they might or might not be members of the tribe; and where there were a number of heirs, each would take his undivided share. It is quite evident that there is no basis for implying the requirement that in such case there should be a selection of a portion of the allotment as a homestead, and all the lands allotted under paragraph 22 are plainly upon the same footing. While it appears from the record that, in the present case, separate certificates of allotment were issued for homestead and surplus lands, this was without the sanction of the statute.

“ In the agreement with the Creek Indians (Act March 1, 1901, 31 Stat. at L. 861, 870, Chap. 676), it was provided that in the case of the death of a citizen of the tribe after his name had been placed upon the tribal roll made by the Commission, and before receiving his allotment, the lands and money to which he would have been entitled, if living, should descend to his heirs, ‘and be allotted and distributed to them accordingly.’ The question arose whether, in such cases, there should be a designation of a portion of the allotment as a homestead. In an opinion under date of March 16, 1903, the then Assistant Attorney General for the Interior Department (Mr. Van Devanter) advised the Secretary of the Interior that this was not required by the statute. He said: ‘After a careful consideration of

the provisions of law pertinent to the question presented, and of the views of the Commissioner of Indian Affairs and the Commission to the Five Civilized Tribes, I agree with the latter that in all cases where allotment is made directly to an enrolled citizen, it is necessary that a homestead be selected therefrom and conveyed to him by separate deed; but that where the allotment is made directly to the heirs of a deceased citizen, there is no reason or necessity for designating a homestead out of such lands, or of giving the heirs a separate deed for any portion of the allotment, and therefore advise the adoption of that rule.' It is true that under the Creek Agreement, in cases where the ancestor died before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw Agreement the allotment was to be made in the *name* of the deceased member, and 'descend to his heirs.' This, however, is a merely formal distinction and implies no difference in substance. In both cases the lands were to go immediately to the heirs, and the mere circumstance that, under the language of the statute, the allotment was to be made in the name of the deceased ancestor instead of the names of the heirs furnishes no reason for implying a requirement that there should be a designation of a portion of the lands as homestead."

The following excerpt from the *Mullen* case is squarely in point:

“ It is true that under the Creek agreement, in cases where the ancestor died before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw agreement the allotment was to be made in the name of the deceased member and ‘descend to his heirs.’ *This, however, is a mere formal distinction and implies no difference in substance.*” (Italics ours.)

Continuing to the same point the court said that it was a *mere circumstance* that in the Choctaw and Chickasaw Nations the lands should be allotted in the name of the deceased member, while in the Creek Nation allotment should be made directly to the heirs. *The government, for the benefit of the Creek Nation, cannot cut off from the heirs of Thlocco the right of inheritance merely for this difference of circumstance. To do this would be to defeat the intention of Congress whereby the heirs were to take by descent.* A mere formal defect in the certificate of allotment or patent cannot divest the heirs of the estate of their ancestor which descended to them by operation of law. The theory of Bissett and his associates on this point is inconsistent with the general scheme of allotment whereby every Creek living April 1, 1899, was to get his allotment. The death of Thlocco prior to the issuance of the certificate was an *extrinsic fact* not in any manner affecting his

right to be one of the *units* for the final partition of the land. The inheritance of the heirs was in no manner impaired by mere formal irregularity not occasioned, as we shall show later, by any default upon their part, but arising in a matter where the government upon behalf of the Creek Nation had to discharge a sacred duty to all the members of the tribe, including these heirs, which duty included, as we shall show, not only the selection of the land for the benefit of the heirs, but the issuance of the certificate and the patent without any application or effort whatsoever upon the part of the heirs. To sum up on this point, *the dissolution of the tribe was had as of April 1, 1899. Every member of the tribe took his right to an allotment as of that date by a fiction of law.* If any member died before actually receiving his land, nevertheless his allotment was considered as having been carved out from the public domain as of that date and cast upon the heirs as of that date by descent. Since the entire transaction, extending through years, was done as of April 1, 1899, when Thlocco was alive, it is wholly immaterial whether the evidence of the heirs' inherited rights was issued in their name or in the name of their ancestor. There are no more lands to allot in the Creek Nation. For the government to prevail would be to take from the heirs the lands which descended to them without the possibility of their receiving any other.

In *Skelton v. Dill*, 235 U. S. 206, 59 L. ed. 198, a Creek allotment was involved. This court said, in opinion by Mr. Justice VAN DEVANTER:

“ The facts out of which the question arises are these: Archie Hamby was born in February, 1900, and died in July, 1901, being survived by his parents and by at least one sister. His mother was a Creek woman, duly enrolled as such in 1895, and his father was a white man, not entitled to enrollment. Two or three years after the child's death his name was regularly placed upon the roll of Creek citizens by the Commission to the Five Civilized Tribes, and the lands in question were duly embraced in an allotment made on his behalf. *A deed for them was also issued in his name, and this, by operation of law, vested the title in his heirs.*” (Italics ours.)

The Arch Hamby allotment was made under act of March 1, 1901, 31 Stat. 861, as modified and supplemented by the Act of June 30, 1902, 32 Stat. 500, which provided for the enrollment of certain children born after April 1, 1899. Provision similar to that of Section 28, *supra*, was made for allotments upon behalf of such deceased children. The declaration of this court “A deed for them (the heirs) was also issued in his name and this by operation of law vested the title in his heirs,” is grounded upon the proposition that the heirs took by descent or as if by descent, by operation of the statutes.

In *Woodward v. deGraffenried*, 238 U. S. 284, 59 L. ed. 1310, there was involved a "Curtis Bill" allotment by which the allottees, prior to the Original Creek Agreement, took merely the surface right of the land. The allottee had died before the Original Creek Agreement. All such "Curtis Bill" allotments were confirmed by Section 6 of the Original Creek Agreement, which provides:

" All allotments made to Creek citizens by said commission prior to the ratification of this agreement, as to which there is no contest, and which do not include public property, and are not herein otherwise affected, are confirmed, and the same shall, as to appraisement and all things else, be governed by the provisions of this agreement; and said commission shall continue the work of allotment of Creek lands to citizens of the tribe as heretofore, conforming to provisions herein; and all controversies arising between citizens as to their right to select certain tracts of land shall be determined by said commission."

The Supreme Court held:

" In our opinion the equitable title to the Agnes Hawes allotment was vested in her heirs according to Creek law by the clear meaning of Section 28."

And again to the same point:

" The result was to vest a complete equit-

able title in her 'heirs,' to be determined according to the Creek laws of descent and distribution; and, upon familiar principles, their interest, being vested, was not divested by the subsequent adoption of the act of May 27, 1902."

And further:

" It is perhaps unnecessary to say that the subsequent issue of a patent to the 'heirs of Agnes Hawes,' without naming them, conveyed the legal title to those persons upon whom the equitable title was conferred by the Original Agreement."

To say in a case like that of Thlocco that the heirs took by descent is to announce in different words the proposition that the heirs took a complete equitable title as if at the death of Thlocco by operation of law without any allotment certificate or patent. This inherited right of the heirs was in the nature of a *float* until the survey and designation of a particular 160 acres of land by the Commission as the Barney Thlocco allotment, but at that moment, without the issuance of an allotment certificate, the *mere selection and survey separated the inheritance of these particular heirs from that of all others similarly situated and was a final designation of the particular estate which descended upon them in the right of their ancestor, and their right thereto was*

indefeasible regardless of what the government might or might not do thereafter.

In *Folk v. United States*, 233 Fed. 177, there was involved a Creek allotment made in the name of Thomas Atkins. The bill by the government was upon the theory that Thomas Atkins was not alive upon April 1, 1899. The United States contended that the allotment certificate and patent in the name of Thomas Atkins was void. The Circuit Court of Appeals for the Eighth Circuit determined the case against the United States upon the ground that the government had not impeached successfully the judgment of the Commission to the Five Civilized Tribes enrolling Thomas Atkins, holding, in effect, that the certificate and patent in the name of Thomas Atkins, though dead, operated to pass the title to his heirs.

In the *Mullen* case, *supra*, in discussing the effect of the allotment certificate, the court cited several cases very instructive upon the point involved here, using this language:

“ There was undoubtedly a complete equitable interest which, in the absence of restriction, the owner could convey. *Doe ex dem. Mann v. Wilson*, 23 How. 457, 16 L. ed. 584; *Crews v. Burcham*, 1 Black., 352, 17 L. ed. 91; *Jones v. Meehan*, 175 U. S. 1, 15-18, 44 L. ed. 49, 55, 57, 20 Sup. Ct. Rep. 1.”

In *Doe v. Wilson*, cited in the *Mullen* case, *supra*, there was involved lands allotted to a Pottawatomie Indian. It was held that the reserves took by the treaty directly and that the law itself converted the reserved section into individual property and that the subsequent survey, selection of the land and issuance of patent operated to pass legal title to the heirs as though they had taken the same during their ancestor's life; that is to say, the heirs took the land by operation of law though it was definitely located after the death of their ancestor. The case of *Crews v. Burcham*, cited in the *Mullen* case, *supra*, is squarely in point. Here was involved land of the Pottawatomie tribe of Indians as in the *Doe-Wilson* case, *supra*. It was held that the reservation created by law an equitable interest in the land to be selected under the treaty, and that though the survey and selection were made after the death of a reservee and the patent was made in the name of the deceased man, it operated under the law to pass the legal title to the heirs. The court invoked the act of May 20, 1836, 5 Stat. 31, which provides: "That in all cases where patents for public lands have been or may hereafter be issued in pursuance of any law of the United States to a person who had died or who shall hereafter die before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs and devisees or assigns of

such deceased patentee as if the patent had issued to the deceased person during life," and applied the same to an *Indian allotment*. By reference to *Doe v. Wilson, supra*, it is clear that the Pottawatomie title was substantially the same in every way as the Creek title, that is to say, the members of the tribe had the perpetual right to the use of the land with the ultimate title in the government. It is contended by counsel for Bissett that the beneficial right conferred by law upon the heirs must fail because Thlocco had not received his allotment and that the same was never allotted to the heirs as such. But in *Crews v. Burcham*, where the situation was substantially the same as here, this court held that the heirs took the complete equitable title by *descent* and that the subsequent selection, designation and segregation of the reservation from the public domain of the tribe as and for the land of the ancestor inured to the benefit of the heirs, and that so far as the legal title was concerned, it passed under the said act of May 20, 1836, which Act, having been applied under similar circumstances to a Pottawatomie allotment, should be applied to a Creek allotment if such application should appear necessary to preserve in the heirs the rights intended by Congress to be conferred upon them through their ancestor. We shall discuss this statute more fully in paragraph D under this same head.

There is obvious propriety in the fulfillment by the government of its undertakings towards these wards of the nation. Surely the defendants who claim through a pretended subsequent allotment should not be heard to say that though Barney Thlocco was alive April 1, 1899, and was entitled to an allotment, which right descended upon his heirs, and though it was the duty of the Commission to the Five Civilized Tribes to set aside such allotment to the heirs in virtue of the beneficial right which they had taken by inheritance, that the scheme for allotment must break down and fail to protect the heirs on account of the default of the representatives of the government. To seek such a technical advantage over these dependent people to whom the government owes such a sacred obligation is not consistent, we respectfully submit, with the generous policy of the United States in dealing with the members of these Indian tribes. The plain propriety in a fulfillment by the government of its undertakings in a matter of this sort is discussed in *McArthur's Heirs v. Dun's Heirs*, 7 How. 263, 12 L. ed. 693, 696, where it was said:

“ There is an obvious propriety in a fulfillment of its undertakings by the government, and in its forbearance to enforce a forfeiture founded on no delinquency in those who would be affected thereby. * * * ‘The death of the

grantee is an extrinsic fact, not impairing the equity of the claim as against the government'."

In *Gould v. West*, 32 Tex, 339, 350, in discussing a similar matter, the Supreme Court said, referring to the undertakings incumbent upon the officers of the Land Department:

" These were public official acts, which committed the government to the fulfillment of its sacred pledge, and which the government had provided in the act itself might be judicially enforced against its ministerial agents. This constituted the *legal tie*, the *obligation* of the government, and the *right* of the citizen."

(2) *The land did not pass by GRANT; it was received in PARTITION or allotment, and therefore, the rules governing an ordinary grant do not apply.*

—Section 3, Act March 1, 1901, 31 Stat. 861;
Shulthis v. McDougal, 170 Fed. 529;
Skelton v. Dill, 235 U. S. 206, 59 L. ed. 198;
McDougal v. McKay, 237 U. S. 372, 59 L. ed. 1001.

Section 3, Act March 1, 1901, and other acts of Congress provide, in effect, that each enrolled member of the tribe shall receive his *pro rata* part in value of the lands and an equal part of the tribal monies, that is to say, there should be a partition, divis-

ion and distribution of the property. Enrolled members of the tribe *did not receive their right to allotments under the statutes but by reason of their membership in the tribe.* Allotment certificates, as we shall show more fully hereafter, are entirely different in character from the certificate of an entryman upon the public lands of the government. The allotment patent is altogether different from the ordinary patent from the government. In the case of the ordinary government grant the entryman's title has its inception in the statutes, but by allotment or partition, through a fiction of law, each enrolled member received an individual allotment of land *which was in theory of law that which he had owned all the time but not theretofore segregated.* Just as in a partition suit between the heirs each person has set aside to him by final decree of the court or by deed the precise tract of land which by a fiction of law he inherited from his ancestor, so by fiction of law the segregation of an individual allotment for Barney Thlocco by partition was merely the segregation for him and for his heirs after him of his part of the public domain of the Creek Nation. In short, the allotment to any member of the tribe or upon his behalf was but the designation of that part of the tribal domain which by a fiction of law he had owned theretofore, though the nation and not the members thereof owned the public domain.

In *Skulthis v. McDougal*, 170 Fed. 529, the Circuit Court of Appeals for the Eighth Circuit, in discussing a Creek allotment, said:

“ The right to such a share is not created by the statutes, but is simply recognized and enforced by them * * * While the tribe in carrying out the project grants the legal title to the property, it does not confer the right to that property. *The act by which the distribution is made is spoken of not as a grant, but as an allotment.* * * * When, as here, the time came to disband the tribe, its ownership as a political society could no longer continue, and *the division of its property was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner.* Under such a scheme it cannot be said that the property which passed to an allottee is a new right or acquisition created by the allotment. The right to the property antedates the allotment, and is simply given effect to by that act. Viewing the tribal property and its division in this light, Andrew J. Berryhill acquired his right to the land in question by his membership in the tribe. *It was his birthright.*” (Italics ours.)

And on the same point the court said:

“ Every person whose name was entered on the roll was entitled to an equal proportion of the tribal land and funds.”

In *McDougal v. McKay*, 237 U. S. 372, this court expressly approved the foregoing doctrine of the *Shulthis* case.

The contention that any particular form of certificate or conveyance was necessary to vest the heirs with title to the *birthright* of their ancestor, which birthright was inherited by them, is wholly inconsistent with the theory upon which allotment was made.

The entire domain of the Creek Nation has been partitioned. The few scattering tracts which were not taken in allotment have been sold and the proceeds held for the benefit of all the tribe as equalization money. Each enrolled member of the tribe will receive enough equalization money to make his allotment the equal in value (as of the date of allotment) to that received by every other Creek Indian. The defendants claiming through Posey are here in the attitude of asserting that this great scheme of partition has broken down as to certain beneficiaries thereof through a technical error of the officers charged with administering the laws for the final distribution of the lands. Take, for illustration, an ordinary case of partition: practically all of the claimants have received by final decree of the court or by proper conveyances their proportionate share of the lands in partition; but a few of those entitled

to receive their *pro rata* share of the lands have not yet received, in technical form, the complete evidence of their ownership in and to the particular tracts set apart and designated for them. Can it be doubted that the other parties in partition cannot be heard to say that those equally entitled to lands have not received proper evidence of ownership? Certainly not. The government brings this action for the use and benefit of the Creek Nation with the intention of distributing the proceeds of this allotment among the other members of the tribe who succeeded in acquiring the particular tracts of land to which they were entitled in this great scheme of division and distribution of the tribal domain. The government can assert for the other members of the tribe no stronger claim than they can assert for themselves. *Folk v. United States*, 233 Fed. 177. The precise question here for determination is, Partition of all the public domain having been undertaken among the members of the tribe who were living April 1, 1899, one of whom was Barney Thlocco, can the other members of the tribe assert successfully that Barney Thlocco shall not receive his *pro rata* share of the lands? No reported case holding patent in the name of a dead man void is analogous to the situation presented here where *the heirs are not dependent upon a grant nor upon the statutes* but assert their tribal right to a proportionate share of

the public domain of which there has been a partition. The scheme of allotment is such that the right of the heirs through their ancestor is in no manner impaired for want of a formal certificate or formal patent, for such is not the nature of the tenure of land taken in partition.

(3) *The Commission was required by mandatory Acts of Congress to make arbitrary allotments in cases where the enrolled members did not select for themselves within a reasonable time (the privilege of selection not being accorded to the heirs). Acceptance of allotment certificates and patents was not necessary to pass title. According to departmental practice and construction of the statutes involved, not only did the Commission have the right to make arbitrary allotments but the certificate of allotment and patent in the name of the dead allottee are valid.*

Upon behalf of the defendants claiming through Posey the right of the Commission to make arbitrary allotments is challenged. The defendants contend that the provisions of the law directing and authorizing the Commission to make final rolls and to allot all the lands are mandatory upon the Commission. The defendants also assert that there is no provision

of law which either required or permitted the heirs of a deceased member of the Creek Tribe to make a selection upon behalf of their ancestor. Where allotments were made in the name of living Creeks the members of the tribe were permitted to select for themselves, but no mandatory requirement to select is anywhere placed upon the members of the tribe. In some of the other tribes the time within which citizens might select their allotments was fixed by Acts of Congress with the further provision that if they failed to make selection the Commission should allot for them. But in the Creek Nation, no time limit for selection having been made, it would follow that every citizen would have a *reasonable* time within which to make selection and that at the expiration of such reasonable time it became the duty of the Commission to allot arbitrarily; for *otherwise the entire allotment scheme must have broken down and failed to accomplish the end which Congress had in view*, namely: the dissolution of the tribal government, and final partition of the tribal estate.

The Acts of Congress authorizing and touching the activities of the Commission contain plain and *mandatory* provisions for the making of allotments. By the Act of March 3, 1893 (27 Stat. L. 645), the Commission was created "for the purpose of extinguishment of the national or tribal title to any

lands within that territory now held by any and all of the said nations or tribes, either by the cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes respectively, as may be entitled to the same." All of the work of the Commission from the time it was created until it was abolished, had this end in view.

The first direct authority conferred upon the Commission to allot the land to the individual members of the tribes was contained in the Original Curtis Act, under the terms of which the allotment work was first started in the Creek Nation, a land office having been opened at Muskogee on April 1, 1899. There was nothing in this act which gave a citizen the right to select an allotment, but it was provided that "whenever it shall appear that any member of a tribe is in possession of lands, his allotment *may* be made out of the lands in his possession, including his home, if the owner so desires." Wide publicity was given by the Commission throughout the Creek Nation in regard to the opening of a land office and although no right was given by law to citizens to make selections, the Commission extended to them the privilege. The Creek Land Office was opened more than two years before the Original Creek Agreement became effective, and approximately 10,000 allotments,

or more than half of all those made in the Creek Nation, were made under the provisions of the Original Curtis Act. *deGraffenried v. Iowa Land & Trust Co.*, 20 Okla. 687, 95 Pac. 624-631.

Then came the Original Creek Agreement, which became effective on May 25, 1901, and which contained an unequivocal *command* to the Commission to make allotments. Section 3 (31 Stat. L. 861) provided: "All lands of the said tribe, except as herein provided, *shall* be allotted among the citizens of the tribe by said commission, so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the government survey—which may be selected by him so as to include improvements which belong to him." Permission was thereby extended to citizens to select their allotments in order, primarily, to have the allotment of each citizen include the improvements owned by him. But if a citizen failed to avail himself of the permission within a reasonable time after the Original Creek Agreement became effective, the mandate to the Commission, expressed in the words "shall be allotted," remained, and the duty was on the Commission to carry out the purpose and policy of Congress by setting apart the allotments.

A reading of the Original Agreement discloses that wherever Congress is giving to the citizens permission to make selections, the word "may" is used, but that wherever Congress is giving directions to the Commission about the performance of its duty, the word "shall" is used. The agreement says that the land "*shall* be allotted among the citizens of the tribe by said Commission"; that "there *shall* be allotted to each citizen one hundred and sixty acres of land" which "*may* be selected by him so as to include his improvements"; that "allotment for any minor *may* be selected by his father," etc; that "allotments *may* be selected for prisoners, convicts, etc., by their duly appointed agents, and for incompetents by guardians, etc., but it *shall be the duty* of said Commission to see that such selections are made for the best interest of such parties." To have given the word may a mandatory meaning in the statute under consideration, would have devitalized the whole purpose for which the Commission was created, that is the allotment of the lands in severalty. It was a fact well known to Congress and the administrative officers of the government, that a great many Creeks were bitterly opposed to the individual ownership of the tribal lands. They embarrassed the Commission in all possible ways and many would not make selections for themselves. Another class of Creeks was made up of those who were either too

indifferent or ignorant to avail themselves of the opportunity to make selections. The Creek Land Office was open for more than three years before any arbitrary allotments were made, and there was earnest effort to induce the Creeks to make selections for themselves before the Commission proceeded to carry out the direction of Congress by allotting the lands arbitrarily. If, after three years, a citizen had made no effort to select his allotment, it certainly was reasonable to presume that he either did not intend to make selection or that he was too indifferent touching the whole matter to care whether he received land or not. When the Indian was a minor, the same presumption would apply to the failure of his legal or natural guardian to select for him. It would be absurd to say that the whole scheme of the government looking to the allotment in severalty of the Creek tribal domain could be thwarted by the stubborn refusal or indifferent failure of some Creeks to select allotments. If the Commission had been compelled to sit supine and await selections, the allotment work could never have been completed, and the great policies of Congress, for which the gigantic task of allotting in severalty the domains of the Five Civilized Tribes was undertaken, could never have been made effective. It must always be remembered that Congress had plenary power to dissolve the tribal governments and allot the land among the individual

members without the consent of the tribes or the members themselves.

—*Gritts v. Fisher*, 24 U. S. 640;

Lone Wolf v. Hitchcock, 187 U. S. 553;

McKee v. Henry, 201 Fed. 74;

Sizemore v. Brady, 235 U. S. 441.

It was under this plenary power that Congress charged the Commission with the duty of making the allotments. The permission to citizens to select allotments for themselves was not made an absolute right, and lapsed unless exercised within a reasonable time.

The reports of the Commission, as submitted annually to the Secretary in 1902 and the years following, state cogently the reasons for which, and circumstances under which, allotments were made arbitrarily, and the practices of the Commission in that regard were well known to the Department and to Congress.

At page 39 of their annual report for the fiscal year ending June 30, 1902, the Commission said:

“ The allotment of lands in the Creek Nation was commenced on April 1, 1899, a preliminary allotment of 160 acres being given alike to Creek Indians and Creek freedmen. This work was instituted under the Act of Congress of June 28,

1898 (30 Stat. L. 495), and was continued under the Creek Agreement approved by the Act of Congress of March 1, 1901 (31 Stat. L. 861), which latter legislation confirmed allotments previously made, and in terms, authorized a continuance on the lines adopted by the Commission * * *. A total of 13,144 complete allotments, of 160 acres each, have been made; 1,331 of these were arbitrary allotments made by the Commission for those who persistently refused or neglected to act for themselves, and the remainder were selected by the allottees or their recognized representatives. Partial allotments have been made to an additional 728 persons, and while the exact number of citizens is yet to be determined, it is not believed there remain more than 1,350 allotments to be made out of a total of 14,500. In those cases where arbitrary allotments have been made by the Commission, care has been exercised to see that each allottee received his improvements, or, in the absence of improvements, that land of at least average value was given him. To accomplish this a small party was equipped with a camp outfit and dispatched to the locality in which the neglectful or unwilling allottees made their homes. By the aid of interpreters and a surveyor, it was found possible to locate with a very satisfactory degree of accuracy, the rightful holdings of such citizens; and it is believed that the arbitrary allotments thus made fully meet the requirements of the law and the best interests of those who were attempting to evade it. The party which was organized for this work traversed all that coun-

try lying north of the South Canadian river for a width of 15 miles, beginning on the east boundary and extending to the west boundary of the Creek Nation; all that part of the nation lying east of the Oklahoma line for a width of 18 miles, and north to within 12 miles of the north boundary of the nation, and also all that country situate between North Fork and Deep Fork rivers. The majority of those whose allotments were so located are members of the so-called 'Snake Band,' which is still opposed to the enforcement of the agreement ratified May 25, 1901. In many instances, the members of this faction openly defied the Commission's field men to make a traverse of their improvements, but after the arrest and conviction of a number of the leaders, their followers more readily acquiesced, and, in some instances, signified a willingness to select their land. Many of these Indians were found in an impoverished condition, not possessed of sufficient means to appear at the Commission's allotment office in Muskogee, even though so inclined."

It thus appears that up to June 30, 1902, the Commission had made 1,331 arbitrary allotments in the Creek Nation "for those who persistently refused or neglected to act for themselves." At page 27 of the report for the fiscal year ended June 30, 1903, the Commission said:

"During the fiscal year ended June 30, 1903, 3,499 allotments have been made to Creek citi-

zens; of this number 2,268 was selected by the allottees in person or by their accredited representatives; 329 were made to the heirs of deceased persons and 852 were arbitrary allotments made by the Commission."

At page 31 of the report for the fiscal year ended June 30, 1904, the Commission said:

" Allotments were made during the year to 624 citizens and freedmen of the Creek Nation. Of this number, however, 348 were made arbitrarily by the Commission, 46 being made to the heirs of deceased citizens. All others were made upon personal application of the allottees or their authorized representatives. It is proper to state that in cases where the Commission feels called upon to arbitrarily designate an allotment in whole or in part the selection is made with great care, the best available land being used, with due regard to the location of such land as relates to the allotments of other members of a family or a partial allotment previously selected by the person to whom land is arbitrarily allotted. If it appears from the improvement plats that the allottee owns improvements, he is, of course, given the land which contains his improvements. If he has none, care must be taken not to allot land containing the improvements of another citizen or which would be likely, for any cause, to result in contest proceedings. In short, every effort must be made to make the allotment for the best interest of the allottee."

At page 51 of the report for the fiscal year ended June 30, 1905, the Commission said:

“ Only 1,326 allotments were made during the year, and most of those involved only small tracts of land necessary to complete partial allotment selections previously made. The total area of land allotted during the year is but 37,450.21 acres, the average acreage of each allotment being 28 acres. Of the 1,326 allotments made, only 547 were personally applied for by the allottees, 49 being applied for by the heirs of deceased citizens entitled to allotments of land, while 330 were made arbitrarily by the Commission. The total number of names upon the approved roll of Creek citizens at the close of the fiscal year is 15,513. Of this number 15,356 have received complete allotments of 160 acres each, 50 have selected a part of their allotments, and 107 have made no selection whatever.”

We see that up to June 30, 1905, 15,356 complete allotments had been made to citizens of the Creek Nation, of which 3,261, or more than 20 per cent, were made arbitrarily by the Commission. The Commission's reports went to the Secretary and to Congress and all these thousands of arbitrary allotments were approved, in effect, when the Secretary approved the patents. The authority of the Department to make the allotments was clear and unquestioned.

Congress could have allotted the lands in any manner that it saw fit without even extending to citizens the privilege of selecting allotments so as to include their improvements, and the question arises: Did Congress give the right of selection to the heirs of a deceased enrolled citizen who were entitled to an allotment as such heirs under section 28 of the Original Creek Agreement, ratified by Act of March 1, 1901 (31 Stat. 861)?

Said section is in part as follows:

“ All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred ninety-eight, entitled ‘An Act for the protection of the people of the Indian Territory, and for other purposes,’ shall be placed upon the rolls to be made by said commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.”

Nowhere, either in the Original or Supplemental Creek Agreement (32 Stat. 500), is provision made

for the heirs to select the lands to which they were entitled under the above section. Furthermore, it would lead to endless confusion and be *absolutely impracticable* in many cases to require selection by the heirs as a condition precedent to making a valid allotment to them. In the first place no provision is made for any particular heir to select and where there were several heirs who wanted different tracts, whose selection should be allowed? Should no selection be made at all, would the right of the heirs to an allotment fail for this reason, and if so, when, and by what authority? Again, would it be encumbent upon the Commission to determine who the heirs of a deceased citizen were, and if so by what authority? And should it make an erroneous decision and allot land selected by the wrong person, would it not be required upon ascertaining the true facts to allot the land selected by the rightful heir? It is unnecessary to pursue this line of argument further, for it can readily be seen that to hold that Congress intended that *the heirs* should have the absolute *right* to select an allotment, would be to convict it of gross ignorance and stupidity.

In the Choctaw, Chickasaw and Cherokee Nations Congress permitted selections of allotments to be made by the executor or administrator of the estate, but it was expressly provided that if such

executor or administrator failed to act the Commission should designate the lands to be allotted.

Section 22 of the Choctaw and Chickasaw agreement ratified by Act of July 1, 1902 (32 Stat. 641), is as follows:

“ If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided*, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted.”

Section 20 of the Act of July 1, 1902 (32 Stat. 716), providing for the allotment of the lands of the Cherokee Nation, is almost identical with the above.

The Seminole agreement, ratified by Act of June 2, 1900 (31 Stat. 250), is similar to the Creek Agreement in this respect.

In construing agreements with any of the Five Civilized Tribes, the courts have frequently referred to the agreements with the other tribes and the Acts of Congress relating thereto, and have construed the same together (*Mullen v. United States*, 224 U. S. 448), and in construing the agreements and acts together in this case we see that Congress, while specifically extending the privilege of selection to the executor or administrator in the Choctaw, Chickasaw and Cherokee Nations, made no provisions whatever in the Creek Nation for the selection of an allotment by any one on behalf of the heirs of a deceased citizen. The selection was therefore left to the Commission, as in Choctaw, Chickasaw and Cherokee Nations, where an executor or administrator was not appointed or failed for any reason to make the selection.

Furthermore, the privilege of selection by the executor or administrator is granted in the same section that provides for the descent of the lands to the heirs where the enrolled citizen died before receiving his allotment, and, following the reasoning of the Supreme Court of the United States in *Skelton v. Dill*, 235 U. S. 206, wherein it was held that since no

provision was made by section 28 of the Original Creek Agreement restricting alienation by heirs of lands allotted to them as such, the same were free from restrictions, it would seem that no provision having been made by section 28 for the right of selection, the heirs would have no such right.

In *Mullen v. United States*, 224 U. S. 448, the court considered a similar question holding allotted lands unrestricted except where express provision is made by statute for such restrictions and holding that there is no authority for the selection of an Indian homestead except by the express provision of the statute. This case appears to be conclusive authority in support of the proposition that the heirs had no right to select allotments upon behalf of their ancestor, such right not having been given by the statute. The court said:

“ In the cases falling within this paragraph (section 22) there is no requirement for the selection of any portion of the allotted lands as a homestead, and there is no ground for supposing that it was the intention of Congress that a provision for such selection should be read into the paragraph, so as to assimilate it to paragraph 12 relating to allotments to living members. While the lands were to be allotted in the name of the deceased allottee, they passed at once to his heirs, and as each heir, if a member of the tribe, was already supplied with his home-

stead of 160 acres, there was no occasion for a further selection for that purpose from the inherited lands. No distinction is made between the heirs; they might or might not be members of the tribe, and where there were a number of heirs each would take his undivided share. It is quite evident that there is no basis for implying the requirement that in such case there should be a selection of a portion of the allotment as a homestead, and all the lands allotted under paragraph 22 are plainly upon the same footing. While it appears from the record that, in the present case, separate certificates of allotment were issued for homestead and surplus lands, this was without the sanction of the statute."

It will be observed that in extending the privilege of selection to the executor or administrator of the deceased's estate in the Choctaw, Chickasaw and Cherokee Nations, time is made the essence of the agreement, and if an executor or administrator "be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission shall designate the land thus to be allotted."

Therefore, there rested upon the Commission the *mandatory obligation to select for and allot to or upon behalf of the heirs of Barney Thlocco the lands to which he would have been entitled if living. There*

was no duty resting upon the heirs in that respect. Their vested right to have precisely that which their ancestor would have taken if alive was not impaired by mistake or inadvertence, if any, upon the part of the Commission. The gist of the contention is that the form of allotment certificates was erroneous in that it contained the name of Barney Thlocco instead of the words "heirs of Barney Thlocco," but such contention is not in accord with the great scheme of the government which contemplated that its own officers should be charged with the duty of selecting and delivering to the heirs of the deceased member an allotment and with suitable evidence of the title thereof. We believe that we may assert that the government has never permitted such a right as that vested in the heirs to fail in the case of an Indian partition or allotment. That all the proceedings up to and including the survey, the appraisement and the actual selection of the allotment as and for the Barney Thlocco allotment were entirely regular, there is no question. If the allotment certificate, the evidence of the selection, was made in the wrong form through no fault of the heirs, such mere error of form upon the part of those acting upon behalf of the tribe can make no difference.

The plan of the government for winding up the affairs of the tribe did not require acceptance by the

heirs of the allotment certificate or of the patents. In considering this point, it must be kept in mind that Congress had determined to break up the tribal relations. There was to be no more Creek Nation. The *Indians* were to cease to exist as such, except as a tribe for the purposes of tribal dissolution and partition and distribution of the tribal property, and except as to restrictions on certain lands to extend for a limited period. Plans were made for terminating the guardianship of the government over the Indians. Plenary power was exercised whenever the Indian tribes as such, or the individual members thereof, failed or refused to meet the demands of Congress. We need not cite authorities in support of the familiar proposition that the government gradually abandoned the idea of treating with these Indian tribes with the result that the so-called treaties of more recent years were not treaties at all, but Acts of Congress merely; the consent of the tribes was formal purely, and was sought for reasons of expediency and policy. Throughout all the so-called treaties with the Five Civilized Tribes providing for the allotment of the lands there is in evidence the desire of Congress to make it appear to the members of the tribes that they were consenting, acquiescing, acting for themselves, relinquishing their rights in the public domain in favor of allotments. Many parts of these treaties are purely surplusage, without any

legal force whatever, *inserted for reasons of diplomacy, policy or politics.* The Indians delighted in their tribal politics. For illustration, at section 23 of the Original Creek Agreement there is found the provision "All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his deed." It is entirely clear that this provision in the treaty has no legal effect for the reason that the government never had any interest in the tribal domain except the possibility of reversion—the ultimate title—in the event the tribe should abandon the lands; but when provision was made for the allotment of all the lands to the members of the tribe, Congress having expressly provided that all the lands should be partitioned in severalty among the members of the Creek Nation, there was no longer any question of ultimate title in the government; there was no longer any question of possible reversion to the United States. *Likewise, the provision found at said section twenty-three: "Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title, and interest in and to the same, except in the proceeds of lands reserved from allotment," is without any legal force.* This provision

was more in the nature of a political speech to the members of the tribe than anything else. The theory upon which the allotment was made was this: In lieu of the Indian title by which every member of the tribe had the right to the use of any part of the public domain not in use by another member, each member should take a particular tract of land, which, together with his equalization money, should stand as and for his entire right to the tribal property. *Certainly the plenary power of Congress was sufficient to partition the lands according to the scheme finally adopted in the Original Creek Agreement and thereby vest each allottee with full title to his individual allotment and at the same time completely divest him of all right, title or claim to any part of the public domain of the nation, and precisely this was done by other provisions of law without reference to that part of section 23 here under discussion.*

Section 23 of the Original Creek Agreement also provides, "All deeds when so executed and approved shall be filed in the office of the Dawes Commission, and there recorded without expense to the grantee, and such records shall have like effect as other public records." This language contemplated the recording of the patents by the Commission in books of public record *before* actual delivery to the allottees. Congress was familiar, of course, with the rule

which title from a sovereign passes by record. It certainly was not the intention of Congress to deliver the patents to the thousands of Creek allottees and then to undertake to procure the return of the patents for the purposes of the record. The published reports of the Commission show that the patents were always recorded in the public records before attempt was made at actual delivery. In the case of Thlocco the patents were recorded on the 14th day of April, 1903. If the delivery of patents to individual citizens was a necessary condition precedent to the passing of title, or necessary for any other plan of the government, then it is strange that Congress provided for the recording of patents before delivery. *If the citizens had the right under the law to reject the patents, to decline to accept the title, then we would have an impossible situation, with the patents recorded in the office of the Commission, in place of public record, as clouds upon the title of the tribe and of any subsequent allottee of the land.*

In *Gritts v. Fisher*, 224 U. S. 640, 56 L. ed. 928, the court unmistakably rejected the contention that the members of the tribe, as individuals, had any property rights in the tribal lands after allotment. The Original Cherokee Agreement designated exactly who should be the beneficiaries of the tribal domain and moneys, and closed the rolls against all

persons born after September 1, 1902. Afterwards Congress, by the Act of April 26, 1906, provided for the enrollment and allotment of other Cherokees, namely: those born after September 1, 1902, and the validity of the Act of 1906 was challenged on the ground that to add to the rolls the name of the new-born members of the tribe and allot them lands was in effect diminishing the *quantum* of undivided interest conferred upon each Cherokee as a tenant in common under the Cherokee Agreement of 1902. The argument was made that the Act of 1902 diminished *pro tanto* the *pro rata* interest held by each Cherokee under the Act of 1902. The *plenary power of Congress was sustained, the court holding that Congress could extinguish the claim of the individual members to an interest in the public domain.* The case of *Choate v. Trapp*, 224 U. S. 665, involving the right of the state to tax certain lands in the Choctaw and Chickasaw Nations, does not, when properly analyzed, support the claim that it was necessary for the members of the tribe to accept their patents. There Congress had proposed a treaty to a political entity, a dependent nation, providing that upon final allotment certain lands allotted to the individual members of the tribe should be non-taxable for a given period, and the tribe, as such political entity, having accepted the proposition, it was held that the same was binding upon the United States. In short,

it was held that the government would not break faith with the Indian tribe in a matter of that sort.

In *Fleming v. McCurtain*, 215 U. S. 56, 54 L. ed. 88, the court held that although the Choctaw Treaty of Dancing Rabbit Creek, of September 27, 1830, and letters patent of March 23, 1842, constituted a grant from the United States to the Choctaw Nation of "a tract of country west of the Mississippi river, in fee simple to them and their descendants," the individual citizens of the Choctaw Nation acquired no separate or individual property rights as tenants in common or otherwise in the tribal property. The members of the Creek tribe, therefore, had no individual or separate rights which required relinquishment of the sort described at said section 23. While such separate rights in the individual members of the tribe seem to have been recognized in the Original Creek Agreement, this was by fiction of law for the purposes of the allotment plan.

Even assuming that the delivery of deeds and acceptance thereof by the enrolled citizens who were living was essential, it by no means follows that there had to be a delivery and acceptance of such deeds by the heirs where an allotment was made upon behalf of a deceased member. This was impracticable. Take the case of Thlocco: some forty or fifty persons claim to be his heirs. There are many groups of these

heirs or claimants each asserting entire ownership. To which heir or group of heirs was delivery to be made? Which of the claimants was authorized to accept? How could any particular claimants accept for the rest? What would have been the result if one of the heirs had been willing to accept that all the rest desired to reject? There was no provision of law for the Commission to determine who the heirs were. In practice the Commission did not undertake to determine who the heirs of the deceased member were. If actual delivery and acceptance were necessary, was the patent to be delivered to one heir, accepted by him, then returned, and offered to another, and so on? Let it be granted for a moment, for the sake of argument, that acceptance by the members of the tribe was necessary to extinguish their title and claim to the other part of the public domain. Each heir who was a citizen of the tribe had his individual allotment. The acceptance of a deed to his own allotment extinguished his right to the other lands. If the heir was a non-citizen of the Creek Nation he had no right in the other lands to extinguish. *The only purpose, therefore, which can be assigned as a reason for acceptance by enrolled members utterly fails in the case of heirs, for by taking their own titles they were "deemed to assent to the allotment and conveyance of all the lands of the tribe."*

Finally, on this branch of the case: Tribal government having utterly failed and Congress having determined to make an end of the whole Indian problem in the Five Civilized Tribes (*Woodward v. deGraffenried*, 238 U. S. 284, 59 L. ed. 1311), it is utterly unreasonable to say that this great governmental policy was dependent for its consummation upon the consent of any enrolled members of the tribe. If the contention of Bissett and his associates is right, the plan would have failed. *But beyond all this, even if acceptance were necessary, it would be presumed, in the absence of a showing to the contrary.* *United States v. Shurz*, 12 Otto 378, 26 L. ed. 167, 173; *LeRoy v. Jamison*, Fed. Cases No. 8271. We must conclude, therefore, that the plenary power of Congress was entirely sufficient to carry out to its perfection the allotment scheme and to distribute to the individual members of the tribe all of the tribal property; that if Barney Thlocco was enrolled without application upon the part of the heirs such enrollment was in compliance with the law; that the heirs were not required, if indeed they were even permitted, to select the Barney Thlocco allotment; that title passed by recordation of the patent, of which we shall speak more fully later; no actual delivery to the heirs or acceptance by the heirs of the patents was necessary.

IN RE HEIRS OF JEMIMA. D-40271.

On January 24, 1916, the Honorable Andrieus A. Jones, First Assistant to the Secretary of the Interior, now United States Senator, rendered an opinion, certified copy of which is hereto attached as an appendix, in which the Department of the Interior set forth its practice and construction of various Acts of Congress here involved. The Department was asked to hold, *first*, that an allotment arbitrarily made by the Commission was void; *second*, that the certificate of allotment issued in the name of the dead citizen instead of to the heirs was void; *third*, that the patents conveying the allotment were void because issued in the name of the deceased member of the tribe, and for the further reason that they were never actually delivered to the heirs or accepted by them. All the contentions were decided against applicants, the Department holding that the Commission had the power to make an arbitrary allotment; that the certificate of allotment in the name of the dead citizen was valid, and when the deeds in the name of the dead citizen were recorded they passed the title without actual delivery or acceptance. The Secretary's opinion is in part as follows:

“ The present application purports to be filed on behalf of the heirs of Jemima, and is predicated upon the proposition that the allotment in

question is void; that the land is part of the domain of the Creek Nation and therefore subject to selection by qualified citizens of said tribe. The contention that the allotment is void is based on the following grounds:

“ 1. Because the allotment was arbitrarily made.

“ 2. Because Jemima died prior to the time the allotment was made.

“ 3. Because the deeds conveying said allotment were never delivered to Jemima or to her heirs.

“ Of course if the allotment was regularly and legally made, and the title to the land passed by virtue of the certificate of allotment and deeds of conveyance, the Department can exercise no further control over the title, and would be entirely without jurisdiction to grant the present application.

“ It was intended by the Original Creek Agreement, ratified and confirmed by Congress by Act of March 1, 1901 (31 Stat. 861), as expressed in section 3, to allot to the eligible citizens of the Creek Nation ‘all lands of said tribe, except as herein provided * * * so as to give each an equal share of the whole in value as nearly as may be.’ The manner of allotment is mentioned, and by section 45 it is further provided that ‘all things necessary to carry into effect the provisions of this agreement, not otherwise herein specifically provided for, shall be done under authority and direction of the Secretary of the

Interior.' It was not the intention that one, or any number of Indians, should defeat the purpose of Congress to allot the lands in severalty by failing, or refusing to select their allotments. Opportunity was afforded each citizen to select the land desired by him, and it was specifically provided that the selection might be made so as to include his improvements, and notice was given citizens affected by the resolution of the Commission, above mentioned, and they were allowed 30 days within which to make their selections before arbitrary allotments were made; they were not deprived of the privilege of making selections, and the action of the Commissioner in making arbitrary allotment, so far from being without authority of law, was required in many cases in order to fully carry into effect the objects intended to be accomplished by the agreement and act referred to.

“ There is no merit in the contention that an allotment in the name of a deceased person is void. Section 32 of the Act of June 25, 1910 (36 Stat. 855), provides:

“ ‘Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued, in pursuance of any tribal agreement or Act of Congress, to a person who had died, or who hereafter dies before the approval of such deed, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assigns of such deceased grantee as if the deed had issued to the deceased grantee during life.’

“ The Supreme Court of the United States, in *Skelton v. Dill* (235 U. S. 206), said:

“ ‘Whether an allotment of lands in the Creek Nation which was made on behalf of Archie Hamby, a Creek child then deceased, passed the lands to his heirs free from restrictions upon alienation is the federal question in this case. The facts out of which the question arises, are these: Archie Hamby was born in February, 1900, and died in July, 1901, being survived by his parents and by at least one sister. His mother was a Creek woman, duly enrolled as such, in 1895, and his father was a white man not entitled to enrollment. Two or three years after the child’s death his name was regularly placed upon the roll of Creek citizens by the Commission to the Five Civilized Tribes, and the lands in question were duly embraced in an allotment made on his behalf. A deed for them was also issued in his name, and this, by operation of law vested the title in his heirs.’

“ In the case of *Mullen v. United States* (224 U. S. 448, 456), the court said:

“ ‘It is true that under the Creek Agreement, in cases where the ancestor dies before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw Agreement the allotment was to be made in the *name* of the deceased member and “descend to his heirs.” This, however, is merely formal distinction

and implies no difference in substance. both cases the lands were to go immediately to the heirs.'

" In the supplemental memorandum filed on behalf of the applicants, it is suggested that amended or substitute deeds issue, to contain an appropriate clause to the effect that the same are issued merely for the purpose of validating the allotment heretofore made, and thus remove the legal objection that the same was made to a dead person. It is urged that all proper claimants would be protected thereby, and that such action could hurt no one. If the Department is correct in holding that there is no legal objection to an allotment to a dead person, there is no necessity for the issuance of substitute or amended deeds, and if this allotment is ever cancelled by a court of competent jurisdiction, it will be time enough to consider this request then.

" From the foregoing, it will be seen that the allotment in question was legally made, but it is argued by the applicants that there must have been an acceptance of the deeds before title passed and the jurisdiction of the Department ends, and that herein lies the distinction between this case and those relating to the disposition of the public lands of the United States, where the courts have frequently held that upon the issuance and recordation of patent the control of the Department over the title to the land embraced therein ceases and it can only be attacked through appropriate action in the courts. In this connection it is sufficient to say that if a

ceptance is essential, ample proof thereof is found in the conduct of the present applicants in voluntarily intervening in an action now pending in the District Court of Creek County, Oklahoma, which involves the title to the land in question, and claiming title thereto by virtue of the issuance of the certificate and deeds above referred to.

“ The Circuit Court of Appeals for the 8th Circuit, in speaking of the jurisdiction of the Commission to the Five Civilized Tribes in the issuance of allotment certificates and deeds to citizens of the Choctaw and Chickasaw Nations, and the force and effect thereof, in the case of *Wallace v. Adams* (143 Fed. 716, 721), (affirmed by the Supreme Court of the United States in 204 U. S. 415), said, page 721:

“ ‘The jurisdiction of the Commission and of the Secretary and the effect of their action in the allotment of the lands of the Choctaw and Chickasaw Nations are the same in effect as the jurisdiction and effect of the action of the Land Department of the United States in the disposition of the public lands within its control. The Commission under the direction of the Secretary constitutes a special tribunal vested with the judicial power to hear and determine the claims of all parties to allotments of these lands and to execute its judgments by the issue of the allotment certificates which constitute conveyances of the right to the lands to the parties who it decides are entitled to

the property. This tribunal undoubtedly has exclusive jurisdiction to determine such claims and to issue such a conveyance. The allotment certificate, when issued, like a patent to land, is dual in its effect. It is an adjudication of the special tribunal, empowered to decide the question, that the party to whom it issues is entitled to the land, and it is a conveyance of the right to this title to the allottee. *U. S. v. Winona & St. Peter R. Co.*, 15 C. C. A. 96, 103, 67 Fed. 948, 955. Like a patent, it is impervious to collateral attack. But, as in the case of a patent, if the Commission or the Secretary has been induced to issue the allotment certificate to the wrong party by an erroneous view of the law, or by a gross or fraudulent mistake of the facts, the rightful claimant is not remediless. He may avoid the decision and charge the legal title to the lands in the hands of the allottee, as he may that of the grant to a patentee, with his equitable right to it either on the ground that upon the facts found, conceded, or established without dispute at the hearing before the special tribunal, its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the certificate to him and to give it to another, or through fraud or gross mistake it fell into a misapprehension of the facts proved before it which had a like effect. *James v. Germania Iron Co.*, 46 C. C. A. 476, 479, 107 Fed. 597, 600.'

“ In the case of *United States v. Dowden* (220 Fed. 277), the court said (syllabus) :

“ ‘The selection of an allotment of land by a member of the Chickasaw or Choctaw Tribe of Indians, and the issuance of a certificate of allotment therefor by the Commission to the Five Civilized Tribes, pursuant to statute, vests the allottee with an absolute right to a patent, which may be enforced in the courts, and the Secretary of the Interior has no power to thereafter cancel the allotment and segregate the land for a townsite.’

“ It is too well settled to admit of doubt, or necessitate the citation of authorities, that upon the issuance and recordation of patent to public lands, this Department’s jurisdiction and control over the same is at an end, and since its jurisdiction is the same in effect as to the issuance of final certificates and allotment deeds to members of the Five Civilized Tribes, it follows that it has no jurisdiction to exercise further control over the title to the land herein involved, unless and until the allotment is canceled in a court of competent jurisdiction.”

That the Secretary’s opinion in the *Jemima* case directly states the practice and construction of the Department for many years is manifest from the fact that in the opinion no reference is made to any contrary practice or opinion of the Department, for in departmental opinions if any former practice is

disapproved or prior construction overruled the same is expressly referred to.

The practice in the case of Thlocco supports the view that the opinion of Senator Jones has always been that of the Department. When the Creek Attorney, after the recordation of the Barney Thlocco patents, wrote the Commission challenging the right of Thlocco to an allotment resulting in an *ex parte* investigation without notice to the heirs and finally attempted cancellation of the enrollment of Thlocco, no effort was made by the Secretary to cancel the allotment certificate or patents through any instrumentalities within his Department, but he expressly referred the entire case to the Department of Justice for court action excepting, only, the mere matter of the enrollment. The name Barney Thlocco was stricken from the rolls merely in order that the heirs might not participate in the distribution of moneys of the tribe. The Secretary did not at the time of the attempted cancellation of Thlocco's enrollment question the right of the Commission to make the arbitrary allotment or question the validity of the allotment certificate and patents in the name of the dead citizen, but based his action entirely upon his finding that Thlocco died before April 1, 1899, and for that reason was not entitled to an allotment. We shall discuss this point more fully under the caption "At-

tempted Cancellation of Thlocco's Enrollment," where it will clearly appear that the Secretary made no such claims as those now put forward upon behalf of Bissett and others.

- (4) ***This case is not analogous to an action involving patent issued to a fictitious person. The authorities cited involving patents to fictitious persons examined and found to be not in point.***

The case of *Moffat v. United States*, 112 U. S. 24, 28 L. ed. 623, is the leading federal case holding that a patent to a fictitious person is void. It is easily distinguished from the case of Thlocco. There the Register and Receiver of the public moneys and land office conspiring to defraud the government of a patent for the land, *forged*, in usual form, the series of pretended papers upon which the patent was finally issued. *There never was an entryman or any right of entry involved.* That case differed from this in the following important aspects: *First*, the government first of all impeached the patent by showing that fraud was practiced upon the Department, which impeachment was made in the manner usual where the government seeks to set aside its patent. But here the government, without impeaching the patent, without showing there was no right to a patent, seeks to avoid the burden assumed and discharged by the gov-

ernment in the *Moffat* case as preliminary to its recovery. *Second*, in the *Moffat* case the grantee never lived; the pretended grantee was purely a fiction, a myth. But Thlocco did live. It is admitted by the government in its bill that he did live at least until the month of January, 1899, and within a few weeks of the date, to-wit: April, 1, 1899, when all citizens then alive were to be enrolled. *The moment Thlocco died he left heirs. Not so in the case of a fictitious grant. In this case there was always somebody alive to take the title, either the original allottee, Barney Thlocco, or his heirs.* The bill admits that the defendants, or some of them, are the heirs of Thlocco. A third distinction between the *Moffat* case and this is found in the important fact that there was a *descent* from Thlocco to his heirs immediately upon his death by which the law cast upon his heirs the beneficial right to take the lands *as of the date of the death of their ancestor precisely as if he had lived to take the lands and had died vested with the full title.* Here, invoking the doctrine of the *Mullen* case, *supra*, the error, if error it was, in the issuance of the patent in the name of the dead man instead of the heirs, was a *mere difference of form and not of substance.* The necessary conclusion is that this is not a case of patent to a fictitious person. The defect in the *Moffat* case was of substance, not of form. In any conceivable case where patent is issued to a fictitious

person it would be possible for the government to assert its right to set aside the patent either for error of law, for gross mistake of fact or for fraud. It could not be done on any other ground. In all the reported cases in point where the government prevailed in the cancellation of a patent to a fictitious person, it was upon the ground of fraud. In every instance as preliminary to a retrial of the question passed upon by the Land Department, the patent was impeached for fraud. The case of *McLeod v. United States*, 187 Fed. 261, was where the officers of the government "*faked*" a name, *forged* all the papers and procured the issuance of a patent. No question of a beneficial right in any living person was involved.

UNITED STATES *v.* HAWKINS.

The government places its principal hope upon the point here under discussion in the case of *United States v. Hawkins*, 217 Fed. 11, by the Circuit Court of Appeals for the Eighth Circuit. That case is partly right and partly erroneous. *The conclusion is right in so far as it holds the allotment voidable as against the heirs. It is wrong, as was suggested by Judge Hook in a dissenting opinion in so far as it holds that the patent was absolutely void.*

Chester Hawkins died before April 1, 1899. *His heirs by fraud and perjury afterwards induced the*

*Commission to enroll Chester Hawkins upon the representations that he was alive April 1, 1899. It was held as between the government and the heirs that Chester Hawkins was not in being but was mere myth as regards the right to receive an allotment. This part of the opinion is in accord with authority and is grounded upon the proposition that the government impeached the judgment by showing that the beneficiaries of the allotment procured the same by fraud. As between the government, which was imposed upon by the heirs, and the heirs, the court considered the enrollment and allotment as nullity in a direct action brought to set aside the patent. But first of all the government had to impeach the judgment of the Commission. It alleged and proved, to impeach the judgment and to destroy the force of the patent, that the enrollment and allotment were procured by imposition of the beneficiaries of the enrollment. That is not this case. There is no pretense of fraud or imposition here. The dissenting opinion in the *Hawkins* case suggesting that the patent was voidable only and through it that the title passed to *bona fide* purchasers is thoroughly sound and in accord with the decisions. Strictly speaking the patent was not absolutely void as between the government and the heirs but only voidable. The ground on which it was set aside shows that this is true beyond question, for, the court im-*

peached the patent upon one of the well recognized grounds for impeaching a voidable finding of the land department, namely, fraud by the beneficiaries. But in this case the government has failed to find a way to impeach the finding of the Commission or to impeach the patent and therefore in contemplation of law Barney Thlocco was alive April 1, 1899. *It would have been held in the Hawkins case that Chester Hawkins was alive April 1, 1899, in contemplation of law and for the purposes of that action, had it not been for the fact that the government impeached the judgment by showing that it was procured by fraud.* An accurate statement of the law-point involved in the *Hawkins* case, we most respectfully suggest, is to say, since the heirs, the beneficiaries of enrollment, procured the enrollment and allotment by fraud, imposition and perjured testimony, the case falls squarely within one of the well defined rules for the avoidance of a voidable patent. As suggested by Judge Hook there could be no way to protect innocent purchasers without holding the patent voidable merely and not void. The decision of the Supreme Court in *Colorado Coal Co. v. United States*, 123 U. S. 307, 31 L. ed. 182, announces the rule in correct terms. There it was held that patents to lands certified and patented to names of alleged fictitious persons were voidable only and could be set aside or impeached only by showing that the defend-

ants procured the patents in the names of fictitious persons with a fraudulent intent of acquiring title in themselves. We doubt not that on a re-examination of the same point the expressions in the *Hawkins* case will be so narrowed as to imply that even in a case of that sort as between the government and the heirs the patent is voidable only and not void. This is the position the court must take if justice is to be done and innocent persons protected and if land titles are to be rendered stable and certain. But, however, that may be, for the purposes of this case, let the *Hawkins* case stand with all of its breadth and sweeping declaration and still the government fails because it has not impeached the judgment of the Commission and the patent. To sum up the *Hawkins* case as applied to the Barney Thlocco allotment, the government is constantly confronted with the proposition that Barney Thlocco was alive on April 1, 1899, until the finding of the Commission shall have been successfully impeached. Not only has the complainant here failed to attack that judgment upon the ground upon which the *Hawkins* case rests, but it has not so much as alleged or attempted to prove any ground for which any patent was ever set aside in the history of our jurisprudence. *Chester Hawkins was alive in contemplation of law until the judgment there involved was impeached.* Without impeaching the judgment involved in this case the government

by its counsel begs the entire question and assumes throughout its entire brief that Barney Thlocco was dead before April 1, 1899, entirely passing over the insuperable difficulty in the way of the government that in contemplation of the law he is considered alive on April 1, 1899, until that judgment is successfully impeached. *All the authorities hold that before any evidence at all is admissible upon the question, Was Barney Thlocco alive April 1, 1899? the government must show by clear, convincing proof either: that there was no evidence before the Commission; that there was a gross mistake of the facts established before the Commission; or that the judgment of the Commission was procured by imposition or fraud.* To the latter class the *Hawkins* case belongs. The government undertakes to put the wrong end first and would have "the cart before the horse." In the *Hawkins* case the first issue determined was, Did the heirs by their imposition and perjury procure the enrollment of Chester Hawkins? The court found that such was the case. Then the second proposition investigated was, Did Chester Hawkins in fact die before April 1, 1899? The government here undertakes to make proof of the second proposition alleged without establishing the first, without making the preliminary proof, such as was required in the *Hawkins* case.

There never was a moment when there was no a person or persons in being, either with the original or inherited right, to take the Barney Thlocco allotment. Since the Act of May 20, 1836, no beneficial right to any part of the public domain of the United States or to any Indian allotment has failed because the patent was issued in the name of a dead man.

B.

The allotment certificate was final and conclusive evidence of the complete equitable title conferred upon the heirs of Thlocco by the Original Creek Agreement. The certificate, like a patent, dual in its effect, was an adjudication of the special tribunal empowered to decide the question, was Thlocco entitled to the land, and was a conveyance of the right to full legal title.

—*Woodward v. deGraffenried*, 238 U. S. 284,
59 L. ed. 1310, 1327-1328;

Wallace v. Adams, 143 Fed. 716, 74 C. C. A.
540;

deGraffenreid v. Iowa Land & Trust Co., 20
Okla. 687;

Brown v. Carter, 42 Okla. 565, 144 Pac. 170;

Thompson v. Hill, Okla., 150 Pac.
203;

Garfield v. United States, 30 App. D. C. 175;

Mullen v. United States, 224 U. S. 448, 56 L. ed. 841;

Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49;

Garfield by United States, 211 U. S. 249, 53 L. ed. 168;

Section 23, Act of July 1, 1902, 32 Stat. 641,

Section 21, Act of July 1, 1902, 32 Stat. 716.

The allotment certificate was final and conclusive evidence of the right of the heirs to the allotment and operated as a conveyance. While in a certain limited sense the allotment certificate is analogous to an entryman's certificate for part of the public domain of the United States, there is this fundamental difference: the entryman's certificate is only *prima facie* evidence of the entryman's right to a patent. *Lewis v. Shaw*, 59 Fed. 517; *Guaranty Savings Bank v. Bladow*, 176 U. S. 448, 44 L. ed. 540. The allotment certificate is final and *conclusive* evidence of the right to a patent. "Conclusive evidence" is that which the law does not permit to be contradicted. Again, "conclusive evidence means evidence that is uncontrovertible." *Wood v. Chapin*, (N. Y.) 67 Am. Dec. 62, where it was held: "Appointment of trustees under New York absent and absconding debtors act, is conclusive evidence that the steps leading to the appointment were regular." In course of disposing of the public domain by the government there

must come a time when the officers of the Land Department have no further duties except in the performance of mere ministerial acts. In the case of government lands the Department has supervision and control until actual recordation of the patent. But this authority is purely statutory. In the case of Indians of the Five Civilized Tribes, instead of making the recordation of the patent a point at which departmental supervision would end, Congress fixed that point at the issuance of the allotment certificate and made such certificate absolutely final and conclusive of the right to a patent. There were important reasons for this. It was foreseen that it would be many years before all the patents were issued. In the case of the Seminole Nation a large part of the allotted lands had been conveyed before any patents were issued to any of the members of that tribe. *Goat v. United States*, 222 U. S. 458, 56 L. ed. 841. The various treaties with the Five Civilized Tribes providing for the dissolution of the tribal governments and partition of the lands made express provision for all of the allottees to be placed in the immediate possession of their respective allotments, and express provision was made for such allottees exercising all the rights and privileges of absolute ownership, including the right to take the timber and to mine the lands for the rich minerals known to exist in the Indian Territory, the lease for mining purposes

to be approved, in the case of restricted lands, by the Secretary of the Interior, but where the lands were unrestricted the allottees to have the absolute right to remove immediately after allotment the minerals which constitute sometimes the most valuable part of the estate. In certain cases of misdescription or the like the Commission was expressly authorized to correct certificate of allotment, but no broader authority was ever conferred upon the Commission or the Secretary of the Interior as regards the cancellation or correction of allotment certificates. Section 23 of the Act of July 1, 1902, provides :

“ Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein ; and the United States Indian Agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee and the acts of the Indian Agent hereunder shall not be controlled by the writ or process of any court.”

Section 21 of the Cherokee Agreement, Act of July 1, 1902, provides :

“ Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described

therein, and the United States Indian Agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court."

While in the case of the Creek Nation there is no similar language making the allotment certificate final and conclusive evidence of the allottee's right to the land, as has been held by this court, notably in the *Mullen* case, the court may look to the treaties with the other tribes for the purpose of construction in a matter of this kind. The general plan was the same in all the tribes. Section 23 of the Original Creek Agreement provides, in part, as follows:

"Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title, and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment."

In *Wallace v. Adams*, 74 C. C. A. 540, 143 Fed. 716, the court said:

“ The allotment certificate when issued, like a patent to land, is dual in its effect. It is an adjudication of the special tribunal, empowered to decide the question, that the party to whom it issues is entitled to the land, and it is a conveyance of the right to this title to the allottee * * *. Like a patent it is impervious to collateral attack. But, as in the case of a patent, if the Commission or the Secretary has been induced to issue the allotment certificate to the wrong party by an erroneous view of the law, or by a gross or fraudulent mistake of the facts, the rightful claimant is not remediless. He may avoid the decision and charge the legal title to the lands in the hands of the allottee, as he may that of the grant to a patentee, with his equitable right to it either on the ground that upon the facts found, conceded, or established without dispute at the hearing before the special tribunal, its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the certificate to him and to give it to another, or that through fraud or gross mistake it fell into a misapprehension of the facts proved before it which had a like effect.”

Here we have an express holding that after the issuance of the allotment certificate it may be avoided like a patent only by an action in a court of equity

brought for that purpose upon one of the well known grounds for the cancellation of the patent. In *Mullen v. United States, supra*, this court, in its opinion by Mr. Justice HUGHES, said :

“ It does not appear from the allegations of the bill whether patents for the lands had been issued to the Indian grantors before the conveyances were made. But as the lands had been duly allotted, the right to patent was established; and there was no restriction in cases under paragraph 22 upon alienation of the lands prior to the date of patent. There was undoubtedly a complete equitable interest which, in the absence of restriction, the owner could convey.”

Upon the same point in *Woodward v. deGraffenried, supra*, the court said :

“ The result was to vest a complete equitable title in her ‘heirs’—in our opinion the equitable title to the Agnes Hawes allotment was vested in her according to the Creek law by the clear meaning of section 28.”

And continuing on the same point :

“ Upon familiar principles their interest, being vested, was not divested by the subsequent adoption of the Act of May 27, 1902.”

Not even Congress could divest the heirs of the full and complete equitable title cast upon them by

operation of law evidenced by the allotment certificate. *Brown v. Carter*, 42 Okla. 565, 144 Pac. 170, is to the same effect, where the court said, in the third syllabus:

“ An allotment certificate, when issued to an enrolled member of the Five Civilized Tribes of the Indian Territory, like a patent for public lands, is dual in effect. It is an adjudication of the special tribunal empowered to decide the question that the party to whom it issues is entitled to the land and it is a conveyance of the right to this title to the allottee.”

The foregoing statutes and decisions considered, it is obvious that the title of the allottee upon the issuance of the allotment certificate was entirely different from the claim of an entryman upon the public domain who has received his certificate, for in the case of the entryman he does not receive the full and complete equitable title by his certificate nor does that certificate operate as a conveyance. At the most it is only *prima facie* evidence of his claim to a patent. This important difference between the effect of the entryman's certificate and the allotment certificate in the Five Civilized Tribes arises because in the one case the entryman's certificate is made by statute temporary, interlocutory and *prima facie* only, whereas the allotment certificate is made final and conclusive to operate as a conveyance of the full

equitable title. But for further ground of difference; in the case of the entryman, he receives his land by ordinary grant by reason of his compliance with the statutes; but in the case of the allottee in the Five Civilized Tribes he receives his lands as if by partition. We do not overlook the fact that this court has held that, prior to May 4, 1907, after due notice to the allottee, the Secretary of the Interior had the authority to cancel the enrollment of such allottee, which holding would imply that the Secretary was not required after such cancellation of enrollment to issue or deliver a patent to the allottee whose name was so canceled from the approved rolls. But the effect of such cancellation would be merely to prevent the allottee from further participating in the distribution of the tribal moneys and would leave him without legal title to the land. In such a case in an action by the government to cancel the allotment the burden, we apprehend, would still be upon the government to impeach the allotment certificate in the same manner that a patent, if issued, would be impeached. Surely the United States cannot divest the heirs of the full and complete equitable title except by an action in court in which it is shown that their ancestor received the land without right, and, as we have shown in discussion of the principal question involved in this case, recovery could be had only for error of law, gross mistake of the facts proved,

or upon the ground of fraud. It is, therefore, wholly immaterial whether the legal title ever passed to Thlocco or to his heirs. The allotment certificate not having been impeached in this case in the manner required for impeaching recorded patents, the government cannot prevail.

C.

Title by patent from the United States and the Creek Nation is title by record; and delivery of the instrument to the grantee is not essential to pass the title; therefore, when the patent was recorded upon the public records on the 11th day of April, 1903, the legal title of the land passed.

—*United States v. Schurz*, 102 U. S. 273, 12 Otto 378, 25 L. ed. 167;

Peyton v. Desmond, 129 Fed. 1;

Doe v. Exer's Dugan, 8 Ohio Rep. 87, 108;

Smelting Co. v. Kemp, 104 U. S. 636, 640, 26 L. ed. 875.

In *United States v. Schurz*, the court said:

“ When a patent to a citizen for a part of the public lands has been regularly signed by the President, and sealed with the seal of the government, countersigned by the recorder and duly recorded, the right to its possession by the gran-

tee is perfect, and a writ of *mandamus* will lie to the officer in whose possession it is, to compel its delivery.

“ In the progress of the proceedings to acquire, under the laws of the United States, a title to the public lands, there must, in all cases where the claimant is successful, come a period when the power of the executive officers, who constitute the Land Department over those proceedings, ceases. That period is precisely when the last official act had been performed which is necessary to transfer the title from the government to the citizen.

“ Title by patent from the United States is title by record; and delivery of the instrument to the grantee is not essential to pass the title, as in conveyances by private persons.

“ Therefore, when the officers, whose action is rendered by the laws necessary to vest the title in the claimant, have decided in his favor, and the patent has been duly signed, sealed, countersigned and recorded, the title of the land has passed to the grantee, and there remains nothing more to be done by the Land Office but the ministerial duty of delivering the instrument, which can be enforced by *mandamus*.

“ An acceptance of the grant will, in such case, be presumed from the efforts of the grantee to secure the favorable action of the department, and especially from the demand for possession of the patent.”

The *Schurz* case invokes the ancient doctrine that the title of the sovereign passes by recordation of the patent, not by delivery, as in the case of private individuals. We have already shown that actual delivery of patent was unnecessary to pass full legal title to the allottees.

The *Schurz* case is also an authority upon the proposition that where the question involved was one of disputed law and disputed facts there can be no such thing as a void patent. On this point the court said:

“ It is clear that the right and duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade, up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction. How can it be said that when their decision of such a question is finally made and recorded in the shape of a patent, that instrument is absolutely void for such errors as these?

“ If a patent should issue for land in the State of Massachusetts, where the government never had land, it would be absolutely void. If it should issue for land once owned by the government, but long before sold and conveyed by patent to another who held possession, it might be held void in a court of law on the production of

the senior patent. But such is not the case before us. Here the question is whether this land has been withdrawn from the control of the Land Department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void.

“ The mode of avoiding it, if voidable, is not by arbitrarily withholding it, but by judicial proceeding to set it aside, or correct it if only partly wrong.”

The case of *Payton v. Desmond*, 129 Fed. 1, 9, by Circuit Judge VAN DEVANTER, now Mr. Justice VAN DEVANTER, is an excellent authority to the same point.

In *Smelting Co. v. Kemp*, 104 U. S. 636, 640, 26 L. ed. 875, Mr. Justice FIELD said:

“ The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declar-

ation by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law."

The patents in this case having been recorded in the year 1903, prior to the time that the Department commenced its re-examining of Barney Thlocco's right to enrollment resulting in an attempt to cancel his name from the approved rolls, the Department had no jurisdiction. The legal title had already passed to the heirs upon recordation of the patent.

D.

Upon the issuance and recordation of the patents the legal title vested in the heirs of Thlocco under the Act of May 20, 1836, 5 Stat. 31.

Said Act of May 20, 1836, 5 Stat. 31, provides :

" That in all cases where patents for public lands have been or may hereafter be issued in pursuance of any law of the United States, to a person who had died, or who shall hereafter die, before the date of such patent, the title to the land designated therein shall inure to, and become vested in, the heirs, devisees, or assigns of such deceased patentee, as if the patent had issued to the deceased person during life."

It appears that the statute of May 20, 1836, was first applied by this court to an *Indian* in the case of *Doe v. Wilson*, 64 U. S. 457, 16 L. ed. 584, which involved a reservation on behalf of a Pottowatomie Indian.

The Pottowatomie Indians ceded to the United States their title to certain lands in Indiana, Illinois and Michigan, south of the Grand River, and certain reservations were made in favor of individual Indians; and to complete the title to the reserved lands the United States agreed to issue patents to the respective owners. It was provided: "The foregoing reservations shall be selected under the direction of the President of the United States after the lands shall have been surveyed and boundaries shall correspond with the public surveys." The reservee died before a survey of the land and of course prior to the issuance of patent. The contention was made that the patent was void because it issued after the death of the Indian. On the other hand it was claimed that the title was within the provisions of said Act of May 20, 1836, and this latter view of the law was sustained, the court holding "his grantee took the interest he would have taken if living." The court in defining the nature of the Indian title involved, said:

"The United States held ultimate title, charged with the right of undisturbed occupancy and per-

petual possession in the Indian nation with the exclusive power in the government of acquiring title.”

In brief it appears from the *Doe-Wilson* case, that the Pottowatomie title there involved was the same as the Creek title here at issue.

In *Crews v. Burcham*, 66 U. S. 352, 17 L. ed. 91, the matter of the application of the Act of May 20, 1836, to such a situation as the one here involved came squarely before this court and it was held that said act was applicable. The court said:

“ The main and controlling questions involved in this case were before this court in the case of *Doe v. Wilson*, 23 How. 457, which arose under a reservation in this treaty in behalf of the chief, Pet-chi-co.

“ It was there held that the reservation created an equitable interest to the land to be selected under the treaty; that it was the subject of sale and conveyance; that Pet-chi-co was competent to convey it; and that his deed, upon the selection of the land and the issue of the patent, operated to vest the title in his grantee.

“ It is true that no title to the particular lands in question could vest in the reservee, or in his grantee, until the location by the President, and, perhaps, the issuing of the patent; but the obligation to make the selection as soon as the lands were surveyed, and to issue the patent, is ab-

solute and imperative, and founded upon a valuable and meritorious consideration. The lands reserved constituted a part of the compensation received by the Pottowatomies for the relinquishment of their right of occupancy to the government. The agreement was one which, if entered into by an individual, a court of chancery would have enforced by compelling the selection of the lands and the conveyance in favor of the reservee, or, in case he had parted with his interest, in favor of his grantees. And the obligation is not the less imperative and binding, because entered into by the government. The equitable right, therefore, to the lands in the grantee of Besion, when selected, was perfect; and the only objection of any plausibility is the technical one as to the vesting of the legal title.

“ The Act of May 20, 1836, ch. 76 (5 Stat. 31), provides:

“ ‘that in all cases where patents for public lands have been or may hereafter be issued in pursuance of any law of the United States, to a person who had died, or who shall hereafter die, before the date of such patent, the title to the land designated therein shall inure to, and become vested in, the heirs, devisees or assigns of such deceased patentee, as if the patent had issued to the deceased person during life.’

“ We think it quite clear, if this patent had issued to Besion in his lifetime, the title would have inured to his grantee. The deed to Armstrong recites the reservation to the grantee of

the half section under the treaty, and that it was to be located by the President after the lands were surveyed; and then, for a valuable consideration, the grantee conveys all his right and title to the same with a full covenant of warranty. The land is sufficiently identified, to which Besion had the equitable title which was the subject of the grant, to give operation and effect to this covenant on the issuing of the patent within the meaning of this Act of Congress. The act declares the land shall inure to, and become vested in, the assignee, the same as if the patent had issued to the deceased in his lifetime.”

The Supreme Court of Kansas in the case of *Oliver v. Forbes*, 17 Kan. 113, applied the Act of May 20, 1836, to an Indian title similar to the one here involved.

In *Godfrey v. Iowa Land & Trust Co.*, 21 Okla. 293, 310, 95 Pac. 792, the Supreme Court of Oklahoma treated the 1836 act as applicable to a Seminole title where the treaty provisions were substantially the same as those of the Creek Nation, saying:

“ In May, 1836, Congress passed an act, providing that in all cases where patents for public lands have been or may be hereafter issued in pursuance to any law of the United States, if a person who had died, or shall hereafter die, before the date of such patent, the title to the land designated therein shall inure to and become

vested in the heirs of the devisees or assigns of such deceased as if the patent had been issued to the deceased patentee during life. Act May 20, 1836, c. 76, 5 Stat. 31.

“ In the case of *Oliver v. Forbes*, 17 Kan. 127, it was held that this act applied to the case of an Indian who had received his land under a treaty with the United States. After citing a number of cases referring to patent issued after the death of the patentee, the Kansas Supreme Court said: ‘If the patent is valid, it is so merely because it is in confirmation of other existing rights, and not because it created any new rights’.”

To remove any possible doubt Congress later by the Acts of April 26, 1906 and June 25, 1910, legislated to the same point, but irrespective of said recent legislation the legal title must have vested under the Act of May 20, 1836, for in its final analysis the whole allotment scheme was an act of the government and not of the nations of the Five Tribes. The land to be allotted was public land of the United States, subject of course to the rights of the Creek Tribe which were extinguished by agreement with the Tribe in the allotment plan.

The case of *Galloway v. Finley*, 12 Peters 264, 9 L. ed. 1079, is in point. Charles Bradford had received for military service a warrant entitling him to select a tract of land in the Virginia military dis-

trict, and died not having made his selection. The warrant was located upon certain land in the name of the dead man and a patent issued in his name. It was held "That the death of the grantee is an extrinsic fact not impairing the equity of the claim as against the government. His heirs had an interest in common in the military district with all similar claimants." It was held that the heirs took the legal title under the Act of May 20, 1836.

E.

Assuming that the legal title had not already passed, it did pass under the Act of April 26, 1906, at which date this land was not involved in a "contest" within the meaning of section 5 of said act. Said act was retrospective.

Section 5, Act of April 26, 1906, provides:

" That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued,

where the allottee died before the same became effective, shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same: *Provided*, The provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this act."

The words, "All patents heretofore issued where allottee died before same became effective shall be given like effect," control this case, and the further provision, "All patents or deeds to allottees * * * shall be recorded in the office of the Commissioner to the Five Civilized Tribes and when so recorded shall convey legal title," places the legal title of this allotment beyond doubt, the patents in this case having been filed and recorded in the office of the Commissioner to the Five Civilized Tribes April 11, 1903. See *Shulthis v. M'Dougal*, 170 Fed. 529; *Skelton v. Dill*, 235 U. S. 206, 59 L. ed. 198; *Mullen v. U. S.*, 224 U. S. 448, 56 L. ed. 834.

Under date of December 13, 1906, the Secretary of the Interior directed the Commission to strike

the name of Thlocco from the rolls, *declaring at that time that the patents had been issued and delivered.* At pages 61 Print. Rec., appears the order reciting: "The Department has this day canceled the name of Barney Thlocco opposite No. 8592, from the partial list of citizens by blood of the Creek Nation, and has requested the Indian office to take similar action on the roll in its possession. You are hereby authorized to cancel said name from the roll in your custody. It appearing that deeds Nos. 9450 and 9451, covering the allotment selection made to said Barney Thlocco, deceased, *have been issued and delivered heretofore the Attorney General has this day been requested to take such action as he may deem proper looking to the setting aside of said instruments.*" This important departmental construction comes to two points, namely: that the deeds had been delivered and that there was no contest pending with respect to this land on April 26, 1906. Clearly, therefore, the act of April 26, 1906, operated to pass the legal title of this land if it had not passed before that date.

No Contest Was Pending.

Section 5, *supra*, contains the following exception: "*Provided*, the provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes

or the Department of the Interior at the date of the approval of this act." The term "contest" as used in the foregoing Act of Congress when applied to allotments in the Five Civilized Tribes has had always a clear and well-defined meaning and *refers to the adverse claims of different citizens to the same tract of land* and the action of the Department in the determination of such adverse claims. The term never refers to such *ex parte* proceedings as that instituted in August, 1904, when the Creek attorney wrote a letter to the Commission suggesting that Barney Thlocco's right to enrollment be investigated again. In a contest proceeding there were two parties; contests were initiated by adverse claim against a party who had applied for or filed upon land which the contestant claimed as his own; the respective claims of the parties were set forth in pleadings—complaint by the contestant, answer or demurrer by the contestee; definite rules were promulgated by the Secretary of the Interior as to the form and contents of said pleadings, notice was required as a prerequisite to give the department jurisdiction to entertain a contest. Trials were had, judgments entered, rehearings granted and denied, appeals allowed. In the eighth annual report of the Commission to the Five Civilized Tribes for the fiscal year ended June 30, 1901, at page 100 as Appendix No. 9, appears

“Rules of Practice Governing Land Contests Approved by the Secretary of the Interior July 18, 1899.” In order that it may clearly appear that the action of the Department in the case of *Thlocco* has no semblance to a contest, we here set forth said rules:

“APPENDIX No. 9

RULES OF PRACTICE GOVERNING LAND CONTESTS
APPROVED BY THE SECRETARY OF THE
INTERIOR JULY 18, 1899.

Initiation of the Contest.

“ *Rule 1.* Contests must be initiated by an adverse claimant against a party to any application or filing under the laws of Congress relating to the lands of the Five Civilized Tribes, for any sufficient cause, affecting the right of possession of the land in controversy, by applying for the same land.

“ *Rule 2.* Contests must be initiated within ninety days from the date of the original application for the tract of land in controversy.

Pleadings.

“ *Rule 3.* The only pleadings allowed are:

“ *First.* The complaint.

“ *Second.* The answer or demurrer.

Complaint.

“ *Rule 4.* In every case of application for contest a complaint must be filed by the contestant with the Commission to the Five Civilized

Tribes, and at the land office in the nation in which the land lies.

“ *Rule 5.* The complaint must conform to the following requirements:

“ (a) It must be written or partly written and partly printed.

“ (b) It must describe the land involved.

“ (c) It must state the land office where and the date when such application was made.

“ (d) It must give the name of the contestee and the party for whom the contestee made the application.

“ (e) It must give the name of the contestant, and briefly and plainly state the grounds and purposes of the contest and the names of the persons for whom the contest is instituted.

“ (f) It may contain any other information pertinent to the contest.

“ (g) It must be duly verified.

Answer.

“ *Rule 6.* The answer or demurrer may be filed on or before the date set for hearing, and shall conform to the following requirements:

“ (a) It shall contain a denial of each allegation of the contestant controverted by the contestee.

“ (b) It shall contain a statement of any new matter constituting a defense, in ordinary and concise language without repetition.

“ (c) It must be written or partly written and partly printed.

- “ (d) It must describe the land involved.
- “ (e) It must state the land office where and the date when such application was made.
- “ (f) It must give the name of the contestant and the name of the persons for whom the contest was instituted.
- “ (g) It must give the name of the contestee and the party for whom the contestee made the application.
- “ (h) It may contain any other information pertinent to the contest.
- “ (i) It must be verified.

Notice.

“ *Rule 7.* At least twenty days' notice shall be given of all hearings before the Commission, unless by written consent an earlier day shall be agreed upon.

“ *Rule 8.* Summons and notice of contest of hearing must be made upon the blanks prepared and supplied by the Commission.

Service.

“ *Rule 9.* Personal service shall be made in all cases where the party to be served is a resident of Indian Territory, except as provided in rule 12, and shall consist of the delivery of a copy of the notice and summons to each of the contestees.

“ *Rule 10.* When the contest is against the heirs of a deceased applicant, the service shall be upon the executor or administrator of the estate.

“ *Rule 11.* If the person to be personally served is an infant under 16 years of age or a person of unsound mind, service shall be made by delivering a copy to the guardian of such infant or person of unsound mind, if there be one; if there be none, then by delivering a copy to the person having the infant or person of unsound mind in charge and also to the person who made the application for such person.

“ *Rule 12.* Personal service may be executed by any officer of the United States or any person.

“ *Rule 13.* Notice may be given by publication only when it is shown by affidavit of the contestant, and by such other evidence as the Commission may require, that due diligence has been used and that personal service cannot be made. The contestant will be required to show what effort has been made to obtain personal service.

“ *Rule 14.* Service by publication shall be made by advertising at least once a week for two successive weeks in some newspaper published in the Nation where the land in contest lies; and if no newspaper be published in such nation, then in the newspaper published nearest to such land.

“ *Rule 15.* The first insertion shall be at least twenty days prior to the day fixed for the hearing.

“ *Rule 16.* Where service is by publication, a copy of the notice shall be mailed by registered letter to the last known address of each person to be notified twenty days before date of hear-

ing, and a like copy shall be posted in the land office and in a conspicuous place on the land at least two weeks prior to the day set for hearing.

“ *Rule 17.* Proof of personal service shall be the written acknowledgment of the person served or the affidavit of the person who served the notice attached thereto, stating the time, place and manner of service.

“ *Rule 18.* When service is by publication, the proof of service shall be a copy of the advertisement with the affidavit of the publisher attached thereto, showing that the same was successively inserted the required number of times and the date thereof, and the affidavit of the person mailing the notice attached to the post office receipt for the registered letter.

Trials.

“ *Rule 19.* Upon the trial of a contest the Commission will in all cases, when deemed necessary, personally direct the examination of the witnesses, in order to draw from them all the facts within their knowledge requisite to a correct conclusion of any point connected with the case.

“ *Rule 20.* Due opportunity will be allowed opposing claimants and their counsel to confront and cross examine the witnesses introduced by either party.

“ *Rule 21.* A record will be kept of all proceedings at all the hearings and trials and of all the evidence adduced thereat.

Dismissals.

“ *Rule 22.* In cases dismissed for want of prosecution the Commission will, by registered letter, notify the parties in interest of such action.

“ *Rule 23.* Contests may be dismissed at any time by stipulation approved by the Commission.

Defaults.

“ *Rule 24.* Contestant will be given a default against contestee upon failure of the latter to appear and defend on the return day, after due service is shown to have been made, notice to be given to the defendant of said action by registered letter.

Continuance.

“ *Rule 25.* A postponement of a hearing to a date to be fixed by the Commission may be allowed on account of the absence of material witnesses when the party asking for the continuance makes an affidavit before the Commission showing:

- “(a) That one or more of the witnesses in his behalf is absent without his procurement or consent.
- “(b) The name and residence of such witnesses thus absent.
- “(c) The facts to which they would testify if present.
- “(d) Materiality of the evidence.

“(c) The exercise of proper diligence to secure the attendance of absent witnesses.

“(f) That affiant believes said witnesses can be had at the time to which it is sought to have the trial postponed.

“ *Rule 26.* One continuance only shall be allowed to either party on account of absent witnesses.

“ *Rule 27.* No continuance shall be granted when the opposite party shall admit that the witness would, if present, testify to the statements set out in application for a continuance.

Rehearings.

“ *Rule 28.* Motions for reinstatement, after dismissal as provided in Rules 22 and 24, and for rehearing and review, must be filed within ten days from notice of decision and be served upon the opposite party; and orders for rehearings must be brought to the notice of the parties in the same manner as in original proceedings.

Appeals.

“ *Rule 29.* Appeals from the final action or decision of the Commission lie, in every case, to the Commissioner of Indian Affairs, and from his decision to the Secretary of the Interior, and ten days will be allowed for appeal and argument from date of the receipt of notice of the decision in case of personal notice and twenty days in case of service by registered letter. All appeals must be served upon the opposite party within the time allowed for appeal and appellee shall have ten days for replying to appeal and

to serve the same. When an appeal is considered defective the party will be notified of the defect, and if not amended within ten days from notice, the appeal may be dismissed by the office to whom the appeal is taken. All notices will be served upon the attorney of record.

Attorneys.

“ *Rule 30.* Any attorney at law who desires to represent claimants or contestants before the Commission to the Five Civilized Tribes, must file a certificate under the seal of the United States, State, or Territorial Court of the judicial district in which he resides or the local land office is situated that he is an attorney in good standing. All attorneys practicing before the Department of the Interior must comply with the regulations of the Department. (See page 26, Rules of Practice, in cases before United States District Land offices.)

Witnesses.

“ *Rule 31.* All costs incident to the attendance of witnesses in proceedings instituted before the Land Office of the Commission to the Five Civilized Tribes shall be paid by the respective parties to the contest by whose request they have been summoned.”

We call particular attention to Rule 2, requiring that contests be initiated within ninety days from the original application for the land in controversy; Rule 7 requiring at least twenty days' notice of hearing to be given in all cases, and Rule 8, requiring

summons and notice of contest to be made on the blanks supplied by the Commission.

In Laws, Decisions and Regulations Affecting the Work of the Commission to the Five Civilized Tribes, 1893 to 1906, compiled by the Commission to the Five Civilized Tribes at Part IV, page 223, there appears under the caption "History of allotment contest cases," a complete schedule of the contest cases in the Five Civilized Tribes from which it will further appear that a "contest" is a proceeding between two claimants to the same allotment instituted in the manner required by the Secretary and tried somewhat in the fashion of a case in court after due notice.

In section 69 of the Cherokee Treaty, Act of July 1, 1902, it is provided: "After the expiration of nine months after the date of the original selection of an allotment by or for any citizen of the Cherokee Tribe as provided in this act, no contest shall be instituted against such selection, and as early thereafter as practicable patent shall issue therefor." Here we have a definition by Congress of an allotment contest which entirely excludes such *ex parte* proceeding as that had by the Department in this case.

At section 6 of the Original Creek Agreement, Act of March 1, 1901, "Curtis Bill" allotments were

confirmed by the provision: "All allotments made to Creek citizens by said Commission prior to the ratification of this agreement as to which there is no contests, and which do not include public property * * * are confirmed."

Construing said section 6, the Supreme Court, in *Woodward v. deGraffenreid*, 238 U. S. 284, 59 L. ed. 1310, 1328, said in discussing such "Curtis Bill" allotment where the allottee had died before the Original Creek Agreement:

" Under either of the views that we have expressed, the Agnes Hawes allotment, if it was uncontested, if it did not include public property, and was not otherwise affected by the Original Creek Agreement, was confirmed by Sec. 6. That it was not among the excepted classes is sufficiently evidenced by the subsequent action of the Dawes Commission in awarding it to the heirs of Agnes. That which had been tentative and provisional then became, by force of the provisions of the agreement, final and conclusive. The result was to vest a complete equitable title in her 'heirs' to be determined according to the Creek laws of descent and distribution; and, upon familiar principles, their interest, being vested, was not divested by the subsequent adoption of the Act of May 27, 1902, Chap. 888, effective July 1, 1902 (32 Stat. at L. 258; Joint Res. No. 24, 32 Stat. at L. 742), or the Supplemental Creek Agreement (Act of June 30, 1902, Chap.

1323. Sec. 6, 32 Stat. at L. 501, effective August 8, 1902, 32 Stat. at L. 2021), which substituted the Arkansas laws.”

So here that the allotment was not in contest is evidenced by the issuance and recordation of patent. Clearly this court meant in the *Woodward* case that the contest period ended with the award of the land to the heirs.

In the various annual reports of the Commission to the Five Civilized Tribes a history of the allotment contests in the Five Civilized Tribes is set forth and every reference to contests refers to the case of adverse claimants to the same land. See reports for the fiscal years ended as follows:

June 30, 1901, page 40;

June 30, 1903, page 56;

June 30, 1904, page 48;

June 30, 1905, page 54;

June 30, 1909, page 23;

June 30, 1910, page 21.

In all there were 10,951 such contests between citizens of the Five Tribes (report for year ended June 30, 1910, page 21).

The Commission in its report for the year ended June 30, 1905, at page 54, finds the purpose for which contests were permitted as follows:

“ Primarily such allotment contests were to insure each member of the tribe against the loss of improvements owned by him, but in many cases the real bone of contention is the supposed mineral value of the land.”

Continuing in said report for the year ended June 30, 1905, at page 55, the Commission gives the number of contests instituted in the Creek Nation from July 1, 1904, to June 30, 1905, the same being sixteen in number and then sets forth the history of all of these contests. It was August, 1904, when the Creek attorney addressed his letter to the Commission challenging the right of Thlocco to enrollment, but clearly this was not a contest nor did the Commission so treat it.

As to the scope of said proviso excepting said contested allotments from the operation of section 5, we easily reach the conclusion that the exception was inserted merely to protect contestants whose rights had not been passed upon finally by the Department.

The history of the *ex parte* action in Thlocco's case appears at pages 59 and 60, printed record.

Still maintaining that recordation of the patent prior to the Act of 1906 operated as delivery and passed the legal title by virtue of such recordation, we have yet assumed for the sake of argument in

the foregoing suggestions that such was not true until the passage of the Act of 1906, and so assuming, we unhesitatingly contend that such Act of 1906 was *retrospective* first, because *public necessity* required *to be so on account of the well known public history that there were many patents both to original allottees and to the heirs of such allottees where either the allottee nor the heirs could be found by the Dawes Commission in order to make delivery, and second, because unless such act is held to be retrospective there would be two classes, one class after 1906 where recordation of patent would be delivery and would pass legal title, and another class prior to 1906 where recordation would not pass title without delivery and acceptance would be necessary. Congress clearly never intended to give in this way one portion of the tribe an advantage over the other portion.*

F.

Assuming that legal title had not passed theretofore, it did pass under the Act of June 25, 1910.

Section 32, Act of June 25, 1910, 36 Stat. L. 863, provides:

“ Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued, in pursuance of any tribal agreement or Act of

Congress, to a person who had died or who hereafter dies before the approval of such deed, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assigns of such deceased grantee as if the deed had issued to the deceased grantee during life."

This section only makes more clear and definite the meaning of the statutes theretofore enacted.

G.

If patent to Thlocco did not pass title to his heirs as a matter of law, the right thereto is equivalent to the patent, and equity will do that which ought to have been done, and will decree title to the heirs.

—*Stark v. Starr*, 6 Wall. 402, 18 L. ed. 925;

Godfrey v. Iowa Land & Trust Co., 21 Okla. 310, 95 Pac. 798;

Gaylord v. Carroll, (Ore.) 142 Pac. 357.

PROPOSITION FOUR.

THE UNITED STATES HAS NO PECUNIARY INTEREST IN THIS LITIGATION, THE ACTION BEING FOR THE BENEFIT OF THE CREEK NATION, AGAINST WHICH THE DOCTRINE OF LACHES APPLIES; THE GOVERNMENT IS ESTOPPED TO PROSECUTE THE ACTION.

While the defendants cannot plead *laches* against the United States in any matter where the government has either a property interest or a trust to perform, they should be heard to plead *laches* against the Creek Nation. The courts have held that the Creek Nation could not be sued, but it has not been held that the Creek Nation could not sue. If the Creek Nation had the right to maintain an action for the recovery of this land, and it did have such right, we apprehend then, it waited too long to assert its claim. The action by the government is entirely for the benefit of the tribe which still exists in legal contemplation only, however, for the purpose of winding up the tribal affairs. Barney Thlocco was enrolled May 24, 1901. After about fifteen years, when many of the witnesses have died or scattered, the government proposes to retry the question of fact already tried by the Dawes Commission. If this

was permitted, how much time must elapse before land titles in the east half of Oklahoma, formerly Indian Territory, will be settled? It is too late to put the heirs at trial on this issue. It appears that the unending curse of Eastern Oklahoma is unceasing litigation. Home seekers are afraid to buy Indian titles from which restrictions are removed. If the country is to prosper, if the Indians are to receive for their lands upon sale the money which their inherent value merits, titles must be quieted. We respectfully submit that it is not right for the government to stir up litigation of this sort upon the poor showing made in this case. The confusion in land titles is already quite unbearable. Certainly it should be held that time, if nothing else, has put this and similar matters at rest.

The case of *Folk v. United States*, by the Circuit Court of Appeals, Eighth Circuit, 233 Fed. 177, 191, is in point, where it was said:

“ This is a suit in equity. In such a suit the claims of the United States, or of the Creek Tribe, appeal to the conscience of the chancellor with the same, but with no greater or less, force than would those of a private citizen, and, barring the effect of mere delay, they are judiciable in a court of chancery, to whose jurisdiction the state or nation or tribe submits them by every principle and rule of equity applicable to the rights of private citizens under like circum-

stances. *State of Iowa v. Carr*, 191 Fed. 257, 266, 112 C. C. A. 477, 486; *United States v. Stinson*, 197 U. S. 200, 204, 205, 25 Sup. Ct. 426, 49 L. ed. 724; *United States v. Detroit Timber & Lumber Co.*, 67 C. C. A. 1, 10, 131 Fed. 668, 677; *United States v. Chicago, M. & St. P. Ry. Co.*, (C. C.) 172 Fed. 271, 276; *United States v. Chandler-Dunbar Water Power Co.*, 152 Fed. 25, 26, 27, 37, 38, 40, 41, 81 C. C. A. 221, 222, 223, 233, 234, 236, 237; *United States v. Stinson*, 125 Fed. 907, 910, 60 C. C. A. 615, 616; Herman on Estoppel, Secs. 676, 677; *State of Michigan v. Jackson, etc.*, 16 C. C. A. 345, 351, 69 Fed. 116, 122; *United States v. California & Oregon Land Co.*, 148 U. S. 31, 41, 13 Sup. Ct. 458, 37 L. ed. 354; *Carr v. United States*, 98 U. S. 433, 438, 25 L. ed. 209; *Walker v. United States*, (C. C.) 139 Fed. 409, 411, 412, 413.

“ The United States has no pecuniary interest in this litigation. The only pecuniary or property interest or equity in the plaintiffs is that of the Creek Tribe, and as the stream cannot rise higher than its source the equities of the United States are no greater and no less than those of the tribe. *United States v. Beebe*, 127 U. S. 338, 346, 8 Sup. Ct. 1083, 32 L. ed. 121; *French Republic v. Saratoga Vichy Co.*, 191 U. S. 427, 438, 24 Sup. Ct. 145, 48 L. ed. 247; *State of Iowa v. Carr*, 191 Fed. 257, 265, 266, 112 C. C. A. 477, 485, 486; *United States v. Detroit Timber & Lbr. Co.*, 131 Fed. 668, 678, 67 C. C. A. 1, 11; *LaClair v. United States*, (C. C.) 184 Fed. 128, 135, 136; *Mountain Copper Co. v. United States*,

142 Fed. 625, 629, 73 C. C. A. 621, 625; *Chesapeake & Delaware Canal Co. v. United States*, 223 Fed. 926, 929, 930, 139 C. C. A. 406, 409, 410, L. R. A. 1916B, 734. Even where equities are equal the defendant prevails. It is only when the case of the complainant appeals to the conscience of the chancellor with the greater force that he will interfere to grant relief, and in equity no one may successfully deny to the damage of another the truth of statements by which he has purposely or carelessly induced another to so change his situation that the assertion of the truth will irreparably or seriously injure him. *Hemmer v. United States*, 204 Fed. 898, 902, 123 C. C. A. 194, 198; *Town of St. Johnsbury v. Morrill*, 55 Vt. 165, 169; 2 Pomeroy's Equity Juris., Sec. 739; *Illinois Trust & Sav. Bank v. City of Arkansas City*, 76 Fed. 271, 293, 22 C. C. A. 171, 193, 34 L. R. A. 518; *Paxon v. Brown*, 61 Fed. 874, 881, 10 C. C. A. 135, 142; *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 51 Fed. 309, 326, 327, 2 C. C. A. 174, 191, 192.

“ The Creek Tribe made the Creek rolls of 1890 and 1895. By the Creek Agreement (31 Stat. 869, Sec. 28), which it made and ratified, the Creek Tribe contracted with the United States that the Dawes Commission should make the final roll of its citizens and allot them their lands, and that it should base that enrollment on the Creek tribal rolls of 1890 and 1895, and especially upon the latter. It had the opportunity and the privilege to correct and purge its rolls before the tribunal, and it must have had

more knowledge and more means of knowledge whether Thomas Atkins was rightly or wrongly enrolled when its tribal rolls were made, and thereafter, while the Commission was sitting, when the acquaintances of Minnie Atkins were living in the tribe and must have known the facts, than the tribe or its members have ever had since. Either purposely or carelessly it failed to correct its roll, if indeed that roll was erroneous, held that roll out to the Commission as correct in the regard here in question, thereby induced that Commission to enroll Thomas Atkins, purposely or carelessly held the Commission's roll out as correct, and permitted and induced thereby the allotment of this land to Thomas Atkins, the purchase and improvement of it by the defendants. Between making of these rolls from 1890 to 1902 and the commencement of this suit a great change in the value of the land, from a few dollars to many thousands of dollars, has occurred, witnesses who knew the facts 16 to 20 years ago must necessarily have died or disappeared, the memory of others has been dimmed with the passage of time, and this tribe first presents its claim that its rolls were fraudulent after all these events, more than 19 years after its last roll was made, and more than 12 years after the final roll of the Dawes Commission became a public record. The equities of the complainants fail to appeal to the conscience of this court with sufficient force to induce it to appoint a receiver for the property in the possession of the defendants, or to sustain the appointment or the injunction already made. The proof

in this case is neither clear nor convincing, nor satisfactory that it is probable that the plaintiffs will ultimately recover.”

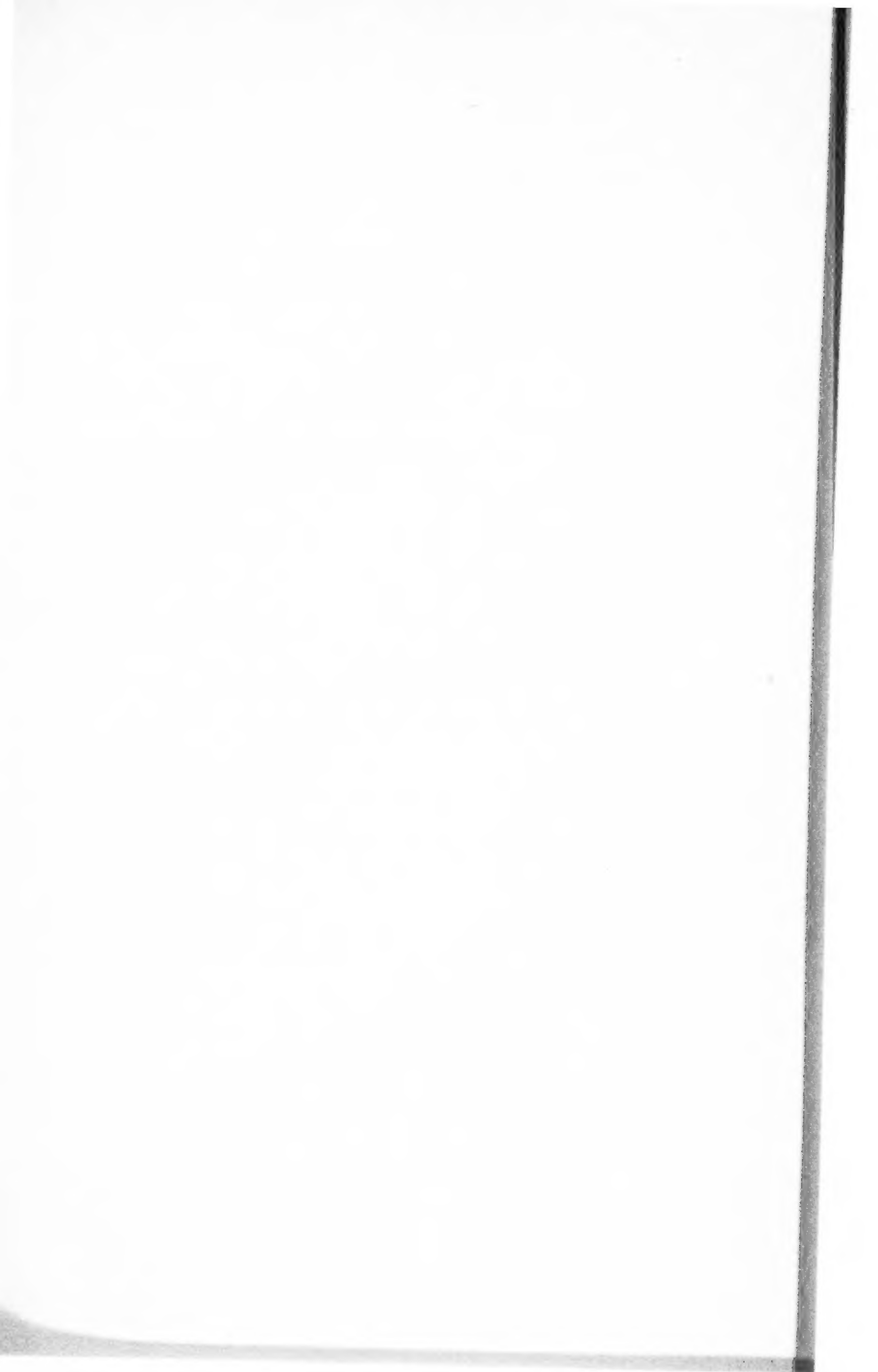
The trial court should be affirmed.

Respectfully submitted,

C. B. STUART,
A. C. CRUCE,
GEO. S. RAMSEY,
EDGAR A. DE MEULES,
MALCOLM E. ROSSEB,
VILLARD MARTIN,
JOHN DEVEREUX,
J. E. WYAND,
K. B. TURNER,
M. E. TURNER,
J. B. FURRY,
E. C. MOTTER,

P. J. CAREY,
W. C. FRANKLIN,
JOHN J. SHEA,
BURDETTE BLUE,
THOMAS F. SHEA,
WILLIAM A. COLLIER,
HAZEN GREEN,
E. J. VAN COURT,
CHAS A. MOON,
FRANCIS STEWART,
JOSEPH C. STONE,

Attorneys for Appellees.



UNITED STATES OF AMERICA.

DEPARTMENT OF THE INTERIOR.

Washington, D. C.,

March 29, 1917.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true and exact copy of the original as it appears of the records and files of this Department.

In Testimony Whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

(Seal)
Department of
the Interior.

BO SWEENEY,
*Assistant Secretary
of the Interior.*

APPENDIX.

DEPARTMENT OF THE INTERIOR

WASHINGTON.

D-40271.

July 24, 1916.

In re Heirs of Jemima.

Application for Allotment in Creek Nation Denied.

DECISION.

This matter is before the Department on the recommendation of the Commissioner of Indian Affairs, under date of July 12, 1916, that the application filed herein for an allotment of land in the Creek Nation to the heirs of Jemima, be denied, and while the Department fully concurs in this recommendation, it is deemed advisable that a separate decision be rendered. Objections to the allowance of the application have been filed by various parties who claim through some of the alleged heirs of the deceased.

The Department is asked by the applicants to hold that an arbitrary allotment of land in the Creek Nation, certificate of allotment and deeds to which have been issued in the name of a duly enrolled but deceased member of said Indian tribe, is void, and it

is sought to have new deeds issued, conveying said land to the heirs of the deceased.

One Jemima was a duly enrolled full-blood citizen of the Creek Nation. She was living on the first of April, 1899, and there is no question of her right to an allotment of her distributive share of the lands of said tribe. She died some time in the fall of 1899 without, however, having selected an allotment, and no selection having been made by her heirs, the following described land was arbitrarily allotted in her name by the Commission to the Five Civilized Tribes, June 30, 1902:

S $\frac{1}{2}$ NE $\frac{1}{4}$, and lots 1 and 2, Sec. 3, T. 17 N., R. 7 E., situated in Creek County, State of Oklahoma, and containing approximately 161.57 acres.

This allotment was made pursuant to a resolution of said Commission, adopted May 24, 1902, which is as follows:

Muskogee, Indian Territory,
May 24, 1902.

A session of the Commission to the Five Civilized Tribes was held at its general office at Muskogee, Indian Territory, on the above date, there being present Commissioners Bixby, Needles and Breckenridge.

• • • • •

Whereas, section three of the Act of Con-

gress approved March 1, 1901 (31 Stat. 861), known as the Creek Agreement, provides that:

“ All lands of said tribe except as herein provided shall be allotted among the citizens of the tribe by said Commission so as to give to each citizen an equal share of the whole in value as nearly as may be,”

and that

“ * * * There shall be allotted to each citizen one hundred and sixty acres of land,”

and whereas, section seven of said act provides that

“ * * * each citizen shall select from his allotment forty acres of land as a homestead,”

and that

“ * * * if for any reason such selection shall not be made for any citizen, it shall be the duty of said Commission to make selection for him.”

And, whereas, numerous citizens of said nation have made no selection of land for allotment and others have made selection of only a portion of the land to which they are entitled, and

Whereas, after due notice given, many citizens of said nation have failed to make a selection of a homestead, therefore, be it

Resolved, That the acting chairman is hereby authorized and empowered by and on behalf of the Commission to allot to each citizen out of the lands of the Creek Nation not heretofore allotted or selected such an amount of land of at

least average quality as will make the total allotment of each citizen one hundred and sixty acres, and to select a homestead for such citizen in all cases where a selection of a homestead has not been made by or on behalf of said citizen:

Provided, That the allotment and selection of homestead so made for a citizen shall include improvements shown by the plats or records of the office to belong to said citizen.

On motion of Commissioner Breckenridge, duly seconded, the same was unanimously adopted.

• • • • •

There being no further business before the meeting the Commission on motion was adjourned.

TAMS BIXBY,

Attest:

Acting Chairman.

A. L. AYLESWORTH, *Secretary.*

Certificate of allotment duly issued and was delivered to one William Buck, who claimed to be a nephew of the deceased. Deeds to the homestead and surplus allotments were executed by the principal chief of the Creek Nation April 3, 1903, and approved by the Secretary of the Interior April 25, 1903. These deeds were recorded in the office of the then Commission to the Five Civilized Tribes, May 5, 1903, and on May 23, 1906, were delivered to said William Buck.

The present application purports to be filed on behalf of the heirs of Jemima, and is predicated upon the proposition that the allotment in question is void; that the land is part of the domain of the Creek Nation and therefore subject to selection by qualified citizens of said tribe. The contention that the allotment is void is based on the following grounds:

1. Because the allotment was arbitrarily made.
2. Because Jemima died prior to the time the allotment was made.
3. Because the deeds conveying said allotment were never delivered to Jemima or to her heirs.

Of course if the allotment was regularly and legally made, and the title to the land passed by virtue of the certificate of allotment and deeds of conveyance, the Department can exercise no further control over the title, and would be entirely without jurisdiction to grant the present application.

It was intended by the original Creek Agreement, ratified and confirmed by Congress by Act of March 1, 1901 (31 Stat. 681), as expressed in section 3, to allot to the eligible citizens of the Creek Nation—"all lands of said tribe, except as herein provided * * * so as to give each an equal share of the whole in value as nearly as may be." The manner of allotment is mentioned, and by section 45 it is

further provided that "all things necessary to carry into effect the provisions of this agreement, not otherwise herein specifically provided for, shall be done under authority and direction of the Secretary of the Interior." It was not the intention that one, or any number of Indians, should defeat the purpose of Congress to allot the lands in severalty by failing, or refusing to select their allotments. Opportunity was afforded each citizen to select the land desired by him, and it was specifically provided that the selection might be made so as to include his improvements, and notice was given citizens affected by the resolution of the Commission, above mentioned, and they were allowed 30 days within which to make their selections before arbitrary allotments were made; they were not deprived of the privilege of making selections, and the action of the Commissioner in making arbitrary allotment, so far from being without authority of law, was required in many cases in order to fully carry into effect the objects intended to be accomplished by the agreement and act referred to.

There is no merit in the contention that an allotment in the name of a deceased person is void. Section 32 of the Act of June 25, 1910 (36 Stat. 855), provides:

Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued, in

pursuance of any tribal agreement or Act of Congress, to a person who had died, or who hereafter dies before the approval of such deed, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assigns of such deceased grantee as if the deed had issued to the deceased grantee during life.

The Supreme Court of the United States, in *Skelton v. Dill* (235 U. S. 206) said:

Whether an allotment of lands in the Creek Nation which was made on behalf of Archie Hamby, a Creek child then deceased, passed the lands to his heirs free from restrictions upon alienation is the federal question in this case. The facts out of which the question arises are these: Archie Hamby was born in February, 1900, and died in July, 1901, being survived by his parents and by at least one sister. His mother was a Creek woman, duly enrolled as such in 1895, and his father was a white man not entitled to enrollment. Two or three years after the child's death his name was regularly placed upon the roll of Creek citizens by the Commission to the Five Civilized Tribes, and the lands in question were duly embraced in an allotment made on his behalf. A deed for them was also issued in his name, and this, by operation of law vested the title in his heirs.

In the case of *Mullen v. United States* (224 U. S. 448, 456) the court said:

It is true that under the Creek agreement,

in cases where the ancestor dies before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw agreement the allotment was to be made in the *name* of the deceased member and "descend to his heirs." This, however, is merely formal distinction and implies no difference in substance. In both cases the lands were to go immediately to the heirs.

In the supplemental memorandum filed on behalf of the applicants, it is suggested that amended or substitute deeds issue, to contain any appropriate clause to the effect that the same are issued merely for the purpose of validating the allotment heretofore made, and thus remove the legal objection that the same was made to a dead person. It is urged that all proper claimants would be protected thereby, and that such action could hurt no one. If the Department is correct in holding that there is no legal objection to an allotment to a dead person, there is no necessity for the issuance of substitute or amended deeds, and if this allotment is ever canceled by a court of competent jurisdiction, it will be time enough to consider this request then.

Since it appears, as above stated, that the deeds were delivered to William Buck, who claimed to be a nephew of the deceased, this fact sufficiently disposes of the question raised as to the invalidity of the allotment, on account of the alleged non-delivery of the

deeds to Jemima or her heirs, as it will be assumed that the officials charged with the execution of this duty properly performed the same.

From the foregoing, it will be seen that the allotment in question was legally made, but it is argued by the applicants that there must have been an acceptance of the deeds before title passed and the jurisdiction of the Department ends, and that herein lies the distinction between this case and those relating to the disposition of the public lands of the United States, wherein the courts have frequently held that upon the issuance and recordation of patent the control of the Department over the title to the land embraced therein ceases and it can only be attacked through appropriate action in the courts. In this connection it is sufficient to say that if acceptance is essential, ample proof thereof is found in the conduct of the present applicants in voluntarily intervening in an action now pending in the District Court of Creek County, Oklahoma, which involves the title to the land in question, and claiming title thereto by virtue of the issuance of the certificate and deeds above referred to.

The Circuit Court of Appeals of the 8th Circuit in speaking of the jurisdiction of the Commission to the Five Civilized Tribes in the issuance of allotment certificates and deeds to citizens of the Choctaw and

Chickasaw Nations, and the force and effect thereof, in the case of *Wallace v. Adams* (143 Fed. 716, 721) (affirmed by the Supreme Court of the United States in 204 U. S. 415), said, page 721:

The jurisdiction of the Commission and of the Secretary and the effect of their action in the allotment of the lands of the Choctaw and Chickasaw Nations are the same in effect as the jurisdiction and effect of the action of the Land Department of the United States in the disposition of the public lands within its control. The Commission under the direction of the Secretary constitutes a special tribunal vested with the judicial power to hear and determine the claims of all parties to allotments of these lands and to execute its judgment by the issue of the allotment certificates which constitute conveyances of the right to the lands to the parties who it decides are entitled to the property. This tribunal undoubtedly has exclusive jurisdiction to determine such claims and to issue such a conveyance. The allotment certificate, when issued, like a patent to land, is dual in its effect. It is an adjudication of the special tribunal, empowered to decide the question, that the party to whom it issues is entitled to the land, and it is a conveyance of the right to this title to the allottee. *U. S. v. Winona & St. Peter R. Co.*, 15 C. C. A. 96, 103, 67 Fed. 948, 955. Like a patent, it is impervious to collateral attack. But, as in the case of a patent, if the Commission or the Secretary has been induced to issue the allotment certificate to the wrong party by an erroneous view of the law, or by a gross or fraudulent mistake of the facts,

the rightful claimant is not remediless. He may avoid the decision and charge the legal title to the lands in the hands of the allottee, as he may that of the grant to a patentee, with his equitable right to it either on the ground that upon the facts found, conceded, or established without dispute at the hearing before the special tribunal, its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the certificate to him and to give it to another, or that through fraud or gross mistake it fell into a misapprehension of the facts proved before it which had a like effect. *James v. Germania Iron Co.*, 46 C. C. A. 476, 479, 107 Fed. 597, 600.

In the case of *United States v. Dowden* (220 Fed. 277) the court said (syllabus):

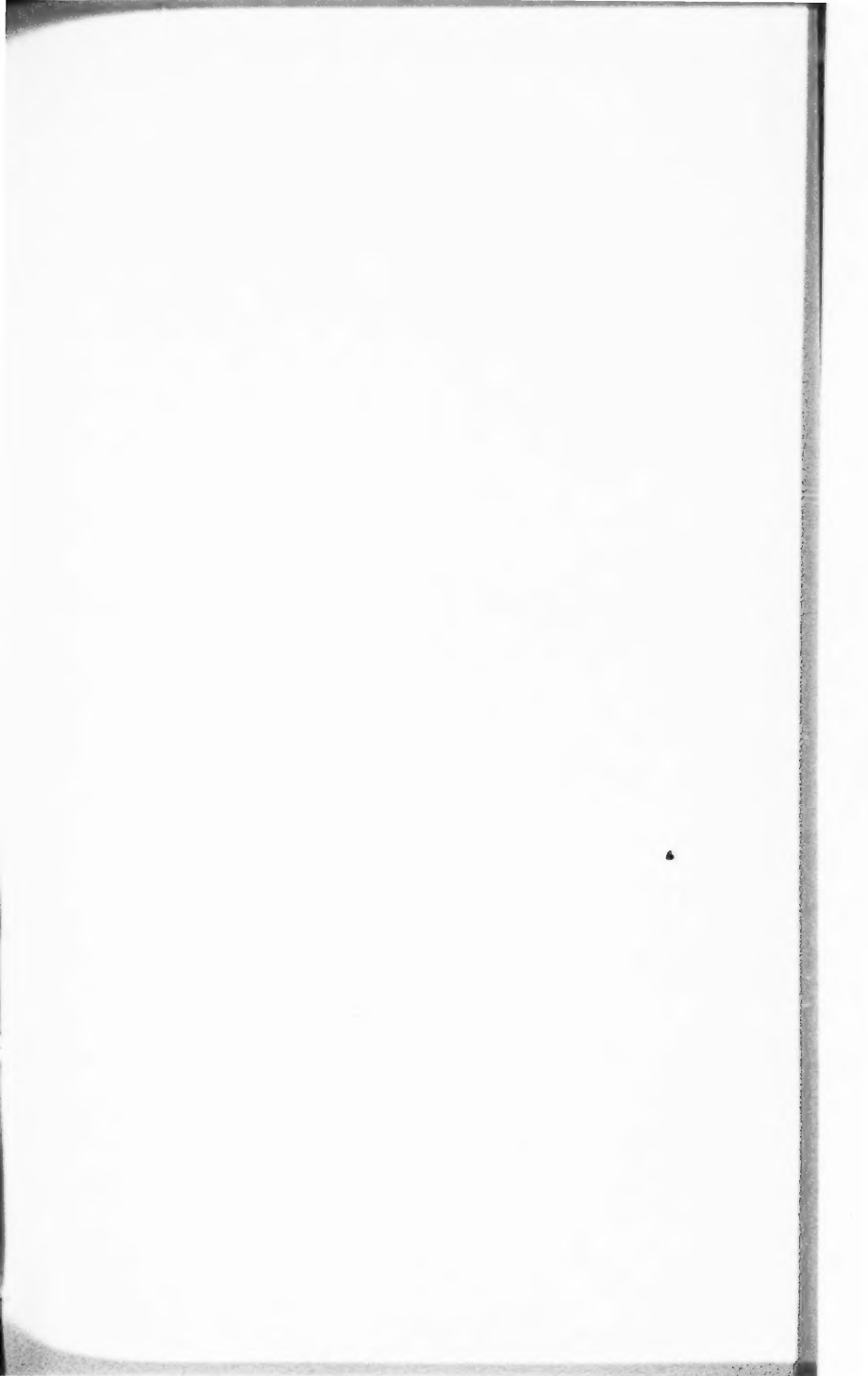
The selection of an allotment of land by a member of the Chickasaw or Choctaw Tribe of Indians, and the issuance of a certificate of allotment therefor by the Commission to the Five Civilized Tribes, pursuant to statute, vest the allottee with an absolute right to a patent, which may be enforced in the courts, and the Secretary of the Interior has no power to thereafter cancel the allotment and segregate the land for a town-site.

It is too well settled to admit of doubt, or necessitate the citation of authorities, that upon the issuance and recordation of patent to public land, this Department's jurisdiction and control over the same

is at an end, and since its jurisdiction is the same in effect as to the issuance of final certificates and allotment deeds to members of the Five Civilized Tribes, it follows that it has no jurisdiction to exercise further control over the title to the land herein involved, unless and until the allotment is canceled in a court of competent jurisdiction.

The application is, therefore, denied.

(Signed) ANDRIEUS A. JONES,
First Assistant Secretary.



In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES	} No. 741.
v.	
BESSIE WILDCAT, A MINOR, ET AL.	

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, and respectfully moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

This is a suit in equity brought by the United States in the District Court of the United States for the Eastern District of Oklahoma against the heirs of one Barney Thlocco, a full-blood Creek Indian, to obtain cancellation of the allotment certificate and deeds for his allotment of 160 acres of land made to Thlocco under the agreement with the Creek Nation providing for the enrollment of all citizens of that nation living on the 1st day of April, 1899, for the purpose of allotting to them certain lands. Relief was prayed on the grounds—

1. That Thlocco died prior to April 1, 1899;
2. That the Dawes Commission, created by the agreement with the Creek Nation, in entering Thloc-

co's name on the tribal roll and causing the land to be conveyed to him, acted under a mistake of law and fact, as well as arbitrarily, and without evidence that Thlocco was living on April 1, 1899; and

3. That the certificate of allotment and deeds to Thlocco were null and void because made to a dead man.

At the trial of the case in the District Court the Government offered to show that Thlocco in fact died in the month of January, 1899; also, that subsequent to the approval by the Secretary of the Interior of Thlocco's enrollment, that officer directed a reopening of the enrollment of Thlocco as well as a rehearing before the Dawes Commission therein, that such rehearing was had and the Secretary of the Interior, on recommendation of the commission, further directed that Thlocco's name be stricken from the tribal roll, which was accordingly done.

The District Court restricted the United States to showing that the Dawes Commission acted in Thlocco's case wholly without evidence, and in dismissing the bill held that the action of that commission was a judicial act and final unless it be alleged and proven that its action was procured by fraud or misrepresentation. An appeal was taken by the Government to the Circuit Court of Appeals for the Eighth Circuit, which has certified to this court the following questions:

I. Should the evidence offered by the Government to show that Thlocco died prior to April 1, 1899, have been admitted?

. Should the evidence offered by the Government to show that Thlocco's enrollment was cancelled by the Dawes Commission have been admitted?
I. Were the certificate of enrollment and deeds Thlocco null and void because he was dead at the time they were made?

Like questions are involved in a number of other cases now pending, and as the answers made herein this court will determine the disposition of those cases, an early solution of the questions presented is desirable.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

DECEMBER, 1916.

○

WILLIAM J. HARRIS, JR.
CLERK OF THE COURT
U. S. SUPREME COURT
WASHINGTON, D. C.

THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 741.

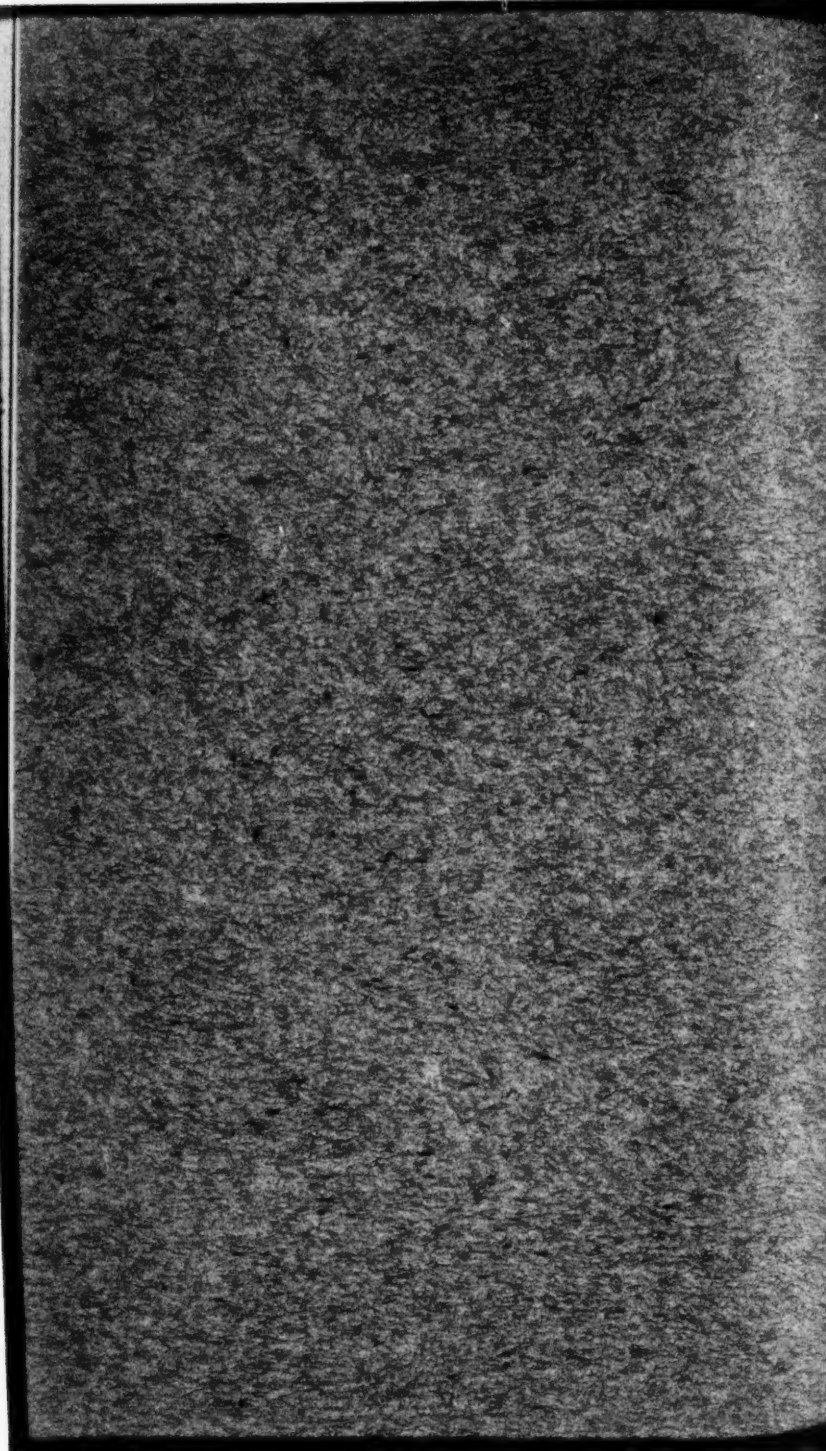
THE UNITED STATES

BESSIE WILCOAT, A MINOR, ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPLICATION FOR THE WHOLE RECORD AND CAUSE
TO BE SENT UP TO THE SUPREME COURT FOR ITS
CONSIDERATION

CHARLES B. STUART,
Oklahoma City, Oklahoma.
JOHN J. SHEA,
Bartlesville, Oklahoma.
JOSEPH C. STONE,
Muskogee, Oklahoma.
Attorneys for Applicants.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 741.

THE UNITED STATES

vs.

BESSIE WILDCAT, A MINOR, ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

**APPLICATION FOR THE WHOLE RECORD AND CAUSE
TO BE SENT UP TO THE SUPREME COURT FOR ITS
CONSIDERATION.**

To the Honorable Supreme Court of the United States:

The application of Bessie Wildcat, a minor; Santa Watson, as guardian of Bessie Wildcat, a minor; Cinda Lowe, Louisa Fife, Annie Wildcat, Emma West, Martha Jackson, a minor; Saber Jackson, as guardian and next friend of Martha Jackson, a minor; J. Coody Johnson, Aggie Marshall, Phillip Marshall, H. B. Beeler, Max H. Cohn, Black Panther Oil & Gas Company, a corporation; Jack Gouge, Ernest Gouge, Mat-

tie Bruner, formerly Mattie Phillips, Jennie Phillips, Billie Phillips, D. L. Berryhill, William McCombs, Barney Unussee, Barnossee Unussee, Fullholchee Barney, Tommy Barney, Mollie Barney, Tony Chupko, Joseph Chupko, James C. Chupko, Eddie Larney, Polly Yargee, Sarkarye Chupko, Dick Larney, Moser Chupko, Tommy Chupko, Linda Harjo, Mary Jones, Loley Cooper, Celia Yahola, Charles S. Smith, Nora Watson, a minor; John Smith, Lewis Smith, Lawrence Smith, Guy Smith, Ella Looney, née Smith; Edna Pike, née Smith; Pearle Smith, Willis Smith, a minor; J. S. Tilly, guardian of Willis Smith, a minor; Rannie Smith, Elizabeth Rhyne, née Smith; Rashie C. Smith, Montie Nunn, née Smith; Lou Smith, Howard Weber, Sabar Jackson, Martha Simmons, Hannah Bullette, Robert Owen Burton, Nathaniel Mack Burton, Lydia Belle Wilson, née Burton; Samuel L. Burton, Abi L. Miller, née Burton; Minnie Ola Edwards, née Burton, and Mary Eliza Burton, respectfully shows to this honorable court that the whole record and this cause should be sent up to the Supreme Court for its consideration for the following reasons, to wit:

First. Because of the magnitude, gravity, and importance of the questions involved. This is a suit by the United States on behalf of the Creek Nation against the heirs of Barney Thlocco, a Creek Indian, to obtain cancellation of the allotment certificate and patents to his 160-acre allotment upon the alleged grounds (1) that Thlocco died prior to April 1, 1899, to wit, in the month of January of that year (31 Stat. at L., 861, 869, provides for the enrollment of all citizens of the Creek Nation, who were living on the first day of April, 1899); (2) that the Dawes Commission in entering his name upon the tribal roll and in causing the allotment to be conveyed to him acted under gross mistake of fact and law and arbitrarily and without evidence as to whether Thlocco was living April 1, 1899 (no charge of fraud is made); (3) that the certificate of allotment and deeds to Thlocco are void because made in the name of a dead man.

The three questions presented by the certificate are:

1. Should the evidence offered by the Government to show that Thlocco died prior to April 1, 1899, have been admitted?
2. Should the evidence offered by the Government to show that Thlocco's enrollment was cancelled by the Dawes Commission have been admitted?
3. Were the certificate of enrollment and deeds to Thlocco null and void because he was dead at the time they were made?

The trial court decided all these questions against the Government.

The Dawes Commission enrolled about 102,000 persons in the Five Civilized Tribes, of which about 18,000 were Creek Indians, and allotted to said 102,000 citizens of the Five Civilized Tribes almost all of the lands of said tribes, the same constituting practically the entire east half of the State of Oklahoma. The Circuit Court of Appeals found that there are "many thousands of identical cases" (Printed Certificate, p. 4). Therefore, the questions involved in this case will be decisive of many similar cases. The trial court on this point held as follows: "In my judgment, if the contention of the Government is sound, it means that these thousands of allotments and patents which have been issued here upon the faith of the enrollment of the Commission to the Five Civilized Tribes of these Indians can now be attacked and set aside by actions of this court merely upon a showing that the Commission, although finding, for instance in the case of the Creek Nation, that the allottee, was living April 1, 1899, made a mistake, and that inasmuch as they made that mistake it devolved upon this court to retry that issue" (Record, p. 110).

A clear and comprehensive history of how enrollment and allotment were made appears in the certified record herein offered, such as the testimony of the Honorable Tams Bixby, Commissioner (Record, p. 94), and the testimony of Edward Merrick, the enrolling clerk, who wrote the census card of Barney Thlocco (Record, p. 66), which history of enrollment and allotment is necessary to a proper understanding of the manner in which enrollment was made and allotments set aside to the individual Indians. All the evidence in the record was offered by the Government. The court dismissed the bill because the complainant did not make a case. This application, therefore, seeks to take up the record as made by the United States.

Second. Because the honorable the United States Circuit Court of Appeals for the Eighth Circuit, we respectfully submit, did not properly find in the certificate one fundamental fact which is necessary to the determination of said question No. 2, in this, to wit: Said court did not find that the attempted cancellation of the enrollment of Thlocco was without any notice to his heirs. It is shown by the pleadings (Record, p. 33), by admissions at the trial (Record, p. 42), and elsewhere in the record, that said proceeding in its entirety was without any notice to the heirs, for which reason the appellees contend that said attempted cancellation was void, relying upon the rule in *Garfield vs. United States ex Rel. Goldsby*, 211 U. S., 255; 53 L. Ed., 168. As late as February 17, 1911, the Government commenced a suit against the "Unknown Heirs of Barney Thlocco," not having up to that time discovered any of them (Record, p. 116). For want of a finding upon this ultimate and fundamental fact, this honorable court cannot properly pass upon said question No. 2 except upon the bringing up of the entire record and the whole case.

Wherefore said applicants herewith tender a duly certi

fied copy of the entire record of said case, and most respectfully pray that the whole record and cause be sent to the Supreme Court for its consideration and determination.

CHARLES B. STUART,
JOHN J. SHEA,
JOSEPH C. STONE,
Attorneys for said Applicants.

THE UNITED STATES OF AMERICA

BEFORE ME, the undersigned authority, on this day personally appeared _____

ON A CERTAIN DAY OF _____

Read and approved of _____

In the
SUPREME COURT OF THE UNITED STATES.
October Term, 1916.

No. 741.

THE UNITED STATES, - - - - - Appellant,

vs.

BESSIE WILDCAT, a Minor, et al., - - Appellees.

INDEX.

PROPOSITIONS DISCUSSED.

(page

An examination of all the statutes in pari materia shows that section 5 of the Act of April 26, 1906 (34 Stat. L. 137), was not intended to operate in the manner claimed for it by appellees 4

This case is not controlled by decisions as to the public land laws, and delivery of the patents was necessary to pass title12

At the time the allotment was made Barney Thlocco was dead and hence the allotment was void and vested no title in his heirs19

It was the duty of the Secretary to correct errors in enrollment and he was vested with authority until March 4, 1907.31

The resolution adopted by the Commission to the Five Civilized Tribes on May 24th, 1902, under which the arbitrary selection for allotment was made for Barney Thlocco on June 30, 1902, is without authority of law, and the acts thereunder are void36

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In the
SUPREME COURT OF THE UNITED STATES.
October Term, 1916.

No. 741.

THE UNITED STATES, - - - - - *Appellant,*

vs.

BESSIE WILDCAT, a Minor, *et al.*, - - *Appellees.*

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT OF GRANT FOREMAN
AND JAMES D. SIMMS AS *AMICI CURIÆ*.

The object of the contention, no doubt, is to
clear the way for the ultimate contention upon which
their case must rest—the want of power of the Sec-
retary of the Interior over rolls which he had once ap-

proved, and after having issued certificates of allotments to the enrolled Indians.

The above language is taken from the opinion of this court in the case of *Lowe v. Fisher*, 223 U. S. 95, where the court held that the Secretary was invested with authority to revise and correct the rolls made under his supervision until March 4, 1907; and is employed by us here to state briefly the contention which we understand is being made in this case. We believe the government should prevail in this suit, and that the three questions certified by the Circuit Court of Appeals for the Eighth Circuit should all be answered by this court in the affirmative; and we shall make a brief argument in support of this view upon the following propositions:

One.

Questions one and two should be answered in the affirmative because Congress reposed with the Interior Department jurisdiction to correct the rolls, even though theretofore approved, and this authority was necessary in order that the Department might properly perform the duties reposed in it.

Two.

Question number three should be answered in the affirmative in view of the law upon the subject.

It is urged that the Government was without authority to cancel the enrollment of Barney Thlocco on December 13, 1906, and is now without authority to cancel the allotment made to Barney Thlocco for the reason that by said allotment and the issuance and recording of the patents conveying the allotted land to Barney Thlocco on April 3, 1902, and the enactment of section 5 of the Act of April 26, 1906, the title had completely vested and the whole subject matter was removed from further inquiry by the Secretary of the Interior. This contention rests on the claim, that whether Barney Thlocco was rightfully enrolled or not, the decision of the Commission upon that point was beyond recall or examination because of the operation of section 5 of the Act of April 26, 1906, upon the patents theretofore issued and recorded.

It is contended on the part of the Government that as the patents have never been delivered and are still in the office of the Department, title has not passed and that section 5 of the Act of April 26, 1906, did not have the effect claimed for it. This section reads as follows:

“ That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and

if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same: *Provided*, The provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this act."

An examination of all the statutes in *pari materia* shows that this section was not intended to operate in the manner claimed for it by appellees.

In our judgment this section was intended to provide for the issuance and delivery of patents in the right of allottees who had died before receiving them; the section still required delivery to the party *entitled* to receive the patents. That Congress found

it necessary to provide for the allotment of lands in the names of deceased members is the strongest legislative construction of prior legislation upon the subject, that no authority theretofore existed for making allotments in the names of deceased Creek members; and in the language which says that when the patents are recorded they "shall convey legal title" the purpose was to vest the legal title in the holder of the equitable title which had vested by reason of selection prior to the death of the allottee. It was intended further to provide a means by which the legal title would vest in the vendees of allotted land conveyed by the allottee who died before receiving his patent.

But it is claimed, notwithstanding Barney Thlococo may not have been entitled to be enrolled, the patents so issued and recorded vested the title by virtue of this section. That is to say that the purpose of Congress and the tribe to provide for enrollment of and allotment to those *only* who were qualified by certain tests, is to be defeated by the application of this section.

We contend that this section is to be construed with all the other legislation bearing on the subject of allotment of the lands of the Five Civilized Tribes in order that its meaning and application may be understood; and that title was intended to pass under

this section only in the event that those claiming were entitled by all of the legislation upon the subject. In the case of *Sizemore v. Brady*, 235 U. S. 441, this court said in speaking of the Creek Agreement:

“It contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them.”

Only in the event, therefore, that the enrollment and allotment of Barney Thlocco conform to law was it possible for title to vest in him or his heirs. Application of section 5 of the Act of April 26, 1906, is to be ascertained by considering all of the other statutes upon this subject. It is well established by this court that all statutes in *pari materia* are to be considered in construing their intention and application.

In the case of *Kohlsaat v. Murphy*, 96 U. S. 1. c. 153, this court said:

“ In the exposition of statutes, the established rule is that the intention of the law-maker is to be deduced from a view of the whole statute, and every material part of the same; and where there are several statutes relating to the same subject, they are all to be taken together, and one part compared with another in the construction of any one of the material provisions,

because, in the absence of contradictory or inconsistent provisions, they are supposed to have the same object and as pertaining to the same system. Resort may be had to every part of a statute, or, where there is more than one in *pari materia*, to the whole system, for the purpose of collecting the legislative intention, which is the important inquiry in all cases where provisions are ambiguous or inconsistent.”

In their general aspect the plans for allotting the lands of the different tribes were similar. They all provided for allotments to be made to the lawfully enrolled members of the tribe, and subsequently deeds or patents running to the allottees or to their heirs were to be executed and delivered to those *entitled* to receive them, whereby the legal title was to vest. The work of the Commission concerning the Creeks was much in advance of that in the other tribes; legislation covering the subject of allotment, delivery of deeds and passing of title was enacted for the Creeks March 1, 1901, more than a year before that for the other tribes (31 Stat. 861).

On July 1, 1902, Congress enacted the Choctaw-Chickasaw Agreement (32 Stat. 641), sections 11 to 24 of which cover the subject of allotment. Sections 27 to 44 cover the subject of enrollment. It was provided that allotments should be made only to those members of the tribes who were enrolled and living

on the date of the ratification of the agreement. Section 35 of the act provided as follows:

“ No person whose name does not appear upon the rolls prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Choctaw and Chickasaw tribes, and those whose names appear thereon shall participate in the manner set forth in this agreement: *Provided, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person whose name is ON THE SAID ROLLS, and who died prior to the date of the final ratification of this agreement. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before the date of the final ratification of this agreement, and any person or persons who may conceal the death of anyone on said rolls as aforesaid, for the purpose of profiting by the said concealment, and who shall knowingly receive any portion of any land or other tribal property, or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense, shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto, a forfeiture to the Choctaw and Chickasaw Nations of the lands, other tribal property, and proceeds so obtained.*”

Similar legislation was had for the Cherokee Nation on July 1, 1902 (32 Stat. 716), wherein it provided in sections 11 to 23 and 25 to 31 for enrollment of and allotment to those members of the tribe who were entitled and who were living on September 1, 1902. Section 31 provided as follows:

“ No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act: *Provided, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll and who died prior to the first day of September, nineteen hundred and two. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before said date, and any person or persons who may conceal the death of anyone on said roll as aforesaid for the purpose of profiting by said concealment, and who shall knowingly receive any portion of any land or other tribal property or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard labor for a period of not less than one year nor more than*

five years, and in addition thereto a forfeiture to the Cherokee Nation of the lands, other tribal property, and proceeds so obtained.”

In the three tribes therefore—the Cherokee, Choctaw and Chickasaw—Congress in the most definite terms had provided against the possibility of any member claiming rights as heir of a deceased allottee where by fraud or inadvertence, mistake or lack of information on the part of the executive officers, as in the case of Barney Thlocco, they had made an allotment to one who was not living on the date necessary to *entitle him or his heirs* to an allotment. Congress made it a crime for such heirs to conceal the date of the death and to claim title to land so allotted.

Can it be said then that section 5 of the Act of 1906 meant that the recording of the patent would pass title to heirs, who would be criminally liable for claiming any benefit thereby?

It is clear that section 5 of the Act of April 26, 1906, applies to all of the Five Civilized Tribes and yet if the contention of counsel for those claiming under the alleged heirs of Barney Thlocco is correct, this section would have the effect of vesting title in persons in the Cherokee, Choctaw and Chickasaw nations who are criminally liable for accepting or claim-

ing the benefits of these titles. It is true that this inhibition against claiming title which does not legally emanate is not to be found in the Creek Agreement, but that in no way militates against the argument that Congress did not intend by the Act of 1906 to vest an irrevocable title in those of the Creek Nation who were by prior legislation denied the right to claim such titles. These various provisions of the law must be considered as parts of a uniform and harmonious body of legislation bearing upon one subject, and only when they are so considered is it possible to ascertain the intention of Congress as disclosed by the various statutes. These inhibitions contained in the Cherokee, Choctaw and Chickasaw agreements, illuminate with a strong light the fixed purpose of Congress to limit allotments to those only who meet the tests prescribed and by the most unequivocal terms charge the Secretary to perform the duties so imposed upon him in strict compliance with the law. How can he obey if he is not to correct the inevitable errors that must creep into this huge undertaking? To say that an exception of these requirements is to be permitted in the Creek Nation is entirely unwarranted.

In the certificate of the Circuit Court of Appeals in this case, it is stated:

“ The Dawes Commission did not treat the rolls as final after their approval. One thou-

sand four hundred forty-seven (1447) names were cancelled from the final rolls of the Choctaw and Chickasaw Nations after their approval by the Secretary. *This was done because these persons, after their final enrollment, were discovered to have died prior to the date fixed by the statute.* There hundred fifty (350) names were stricken from the Cherokee roll at one time for the same reason. Many names were cancelled from the Creek roll upon the same grounds."

If the Secretary had authority to correct errors and cancel from the rolls all of these persons because they did not meet the requirements of the law, he had authority to cancel the allotment of Barney Thlocco, for the same reason. But if he exceeded his authority in his action with reference to Barney Thlocco, then the hundreds and perhaps thousands mentioned above, who were stricken from the approved rolls are entitled to be heard upon the contention that they should be reinstated on the rolls.

This case is not controlled by decisions as to the public land laws, and delivery of the patents was necessary to pass title.

It is contended by counsel representing the grantees of the alleged heirs of Barney Thlocco that the Secretary of the Interior, with reference to these lands, occupies a position similar to that which he

would occupy to them if they were public lands of the United States and that it is immaterial that delivery of the patents to Barney Thlocco has never been made. We contend that this view of the matter is incorrect; that there is a vast distinction between Indian land and public lands and that only when the injunction of this court in the *Sizemore v. Brady* case (235 U. S. 441) has been observed does title pass; the language to which we refer is that "the lands and funds to which it (the Creek Agreement) relates were tribal property and only as it was carried into effect were individual claims to be fastened upon them."

The patents conveying the allotment to Barney Thlocco were never delivered or accepted by anyone and they are now in the office of the Superintendent at Muskogee. Section 23 of the Act of March 1, 1901, provides in part as follows:

" Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands

as may have been selected by him for equalization of his allotment. * * *

“ All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title and interest of the United States in and to the lands embraced in his deed.

“ Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds of lands reserved from allotment.

“ The acceptance of deeds of minors and incompetents, by persons authorized to select their allotments for them, shall be deemed sufficient to bind such minors and incompetents to allotment and conveyance of all other lands of the tribe, as provided herein.”

Provisions similar to those of section 23 of the Creek Agreement, by which the allottee agrees to the terms of the allotment, are found in the legislation referring to the allotment of the Choctaw and Chickasaw lands (30 Stat. L. 541, 32 Stat. L. 641). The United States Supreme Court, in *Choate v. Trapp*, 224 U. S. 665, said of this provision (the Atoka Agreement):

“ The individual Indian had no title or enforceable right in the tribal property. But as one

of those entitled to occupy the land he did have an equitable interest which Congress recognized and which it desired to have satisfied and extinguished. The Curtis Act was framed with a view of having every such claim satisfactorily settled. *And though it provided for a division of the land in severalty, it offered a patent of non-taxable land ONLY to those who would relinquish their claim to the other property of the tribe formerly held for their common use. For the Atoka Agreement, after declaring that 'all lands allotted should be non-taxable,' stipulated further that each enrolled member of the tribe should receive a patent framed in conformity with the agreement, and that each Choctaw and Chickasaw who accepted such patent should be held thereby to assent to the terms of this agreement, and to relinquish all of his right in the property formerly held in common.*

“ There was here, then, an offer of non-taxable land. Acceptance by the party to whom the offer was made, with the consequent relinquishment of all claims to other lands, furnished a part of the consideration, if, indeed, any was needed, in such a case, to support either the grant or the exemption. *Wisconsin & M. R. Co. v. Powers*, 191 U. S. 386; *Home of the Friendless v. Rouse*, 8 Wall. 437; *Tomlinson v. Jessup*, 15 Wall. 458. *Upon delivery of the patent the agreement was executed, and the Indian was thereby vested with all the right conveyed by the patent, and like a grantee in a deed poll, or a person accepting a conveyance, bound by its terms, al-*

though it was not actually signed by him. Keller v. Ashford, 133 U. S. 621; Hendrick v. Lindsay, 93 U. S. 143.

"As the plaintiffs were offered the allotment on the conditions proposed; as they accepted the terms, and, in the relinquishment of their claim, furnished a consideration which was sufficient to entitle them to enforce whatever rights were conferred, we are brought to a consideration of the question as to what those rights were."

The principle announced in this case was referred to as authority by this court in the case of *Williams v. Johnson*, 239 U. S. 414.

Title vested in the members of the tribe only when the Commission acted according to law as was said by this court in the case of *Sizemore v. Brady*; that the delivery and acceptance of the patents was necessary to pass title has been recognized not only in the courts but by the very highest authority in the Department of the Interior. The first expression upon that subject with which we are familiar was that contained in the opinion of Assistant Attorney General VAN DEVANTER, dated April 24, 1902. This opinion was prepared for the Secretary of the Interior, and the question under consideration was, when the title passed to a Creek allottee, which was held to be upon delivery and acceptance of the patent. This opinion is to be identified by File No. Ind. Ter.

Div. 2278-1902, and is a Departmental record and construction of the question, a copy of which we attach hereto as appendix. In the concluding paragraph of the opinion it is said:

“ *The acceptance of the deed by the allottee is to be taken as an assent on his part to the allotment and sale of the land of the tribe as in said agreement provided, and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds of the land reserved from allotment. Not until such a deed is executed, approved and accepted is the transaction complete and the title vested in the allottee.*

“ I am of opinion that the phrase, ‘after receiving title,’ should be construed as referring to the time when *title actually passes by the delivery and acceptance of the deed provided for in said agreement.*”

The Secretary of the Interior, evidently recognizing the cogency of the reasoning in support of that proposition, decided the same question in the same manner in an opinion rendered on February 18, 1904, in Creek Allotment Contest No. 730, entitled *Major v. Thompson*. This opinion may be identified as I. T. D. 6752-1903, and is found on page 193 of the report of the Commission for the year ending June 30, 1904. This was a case that went to the Secretary of the Interior on appeal, and involved the

question, where an allotment had been made and the patent had not been delivered, whether title had passed and jurisdiction to re-allot the land had been lost. In this case the Secretary said:

“ The acceptance of the deed has the effect of the execution and delivery of a deed of release of the allottee's interest in the other communal lands allotted to others of the tribe, like the voluntary deed in partition of one of several common owners. This makes acceptance of the deed a part of the transaction of partition or allotment of the communal property in severalty to the individual members of the communal owners. Such deed is therefore not the equivalent of a patent by the United States to public lands. The individual entryman has no interest in the mass of public lands, and has nothing therein to release. At or before the time of the final entry he renders the full consideration for the land he seeks to acquire, and his assent to the passing of legal title to him is complete at the instant of the final entry. The patent when issued relates to that date, though issued long afterwards. The issue and record of the patent vest legal title, whether it is delivered or not. (*United States v. Schurz*, 102 U. S. 378.) But the nature of Indian titles and effect given by the statute to the delivery and acceptance of the tribal deed make the doctrine of that case clearly inapplicable to allotment deeds.”

At the time the allotment was made Barney Thlocco was dead and hence the allotment was void and vested no title in his heirs.

The allotment to Barney Thlocco was void and passed no title for the reason as is conceded and established by the record that whether or not he was dead on April 1, 1899, he was dead on June 30, 1902, the date of his allotment. Up to March 1, 1901, Congress did not recognize the right to the lands of the tribe of any dead Indian as having survived his death. In other words, when a citizen died his rights died with him. This was so held by this court in the case of *Sizemore v. Brady*, 235 U. S. 441, wherein it was said by the court:

“ The right of each individual to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end.”

The Original Creek Agreement, however, on May 25, 1901, for the first time undertook to recreate in the heirs of a dead citizen the rights which that citizen would have enjoyed if he had survived to claim them. This provision was made by section 28 of that act which reads as follows:

“ All citizens who were living on the first day of April, eighteen hundred and ninety-nine, en-

titled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the people of Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

“ All children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said Commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.”

It will be observed that this section provides, not for an allotment to the dead Indian, but says that the land shall descend to his heirs, and be allotted and distributed to *them*. So, it must be clear in the beginning that the only authority for preserving lands in the right of any dead citizen directed specifi-

cally that allotments of such lands should be made to the heirs. This was so, not only because Congress understood its authority to direct how such rights might be created, but was in recognition of the well-known rule of law that a pretended conveyance of lands to a dead person would pass no title. This point has been passed upon by the courts in connection with allotments of Indian lands.

Even if Barney Thlocco had been living on April 1st, 1899, when he died prior to the date of the allotment to him all the rights which he had in the tribal property died with him, as this court has said; these rights were neither alienable nor descendible. In drafting the Creek Agreement it was undertaken to provide for heirs of Indians who were living on April 1, 1899, and had since died without having received an allotment of land. Section 28 created the right to an allotment of land in favor of such heirs, contingent upon the performance of certain acts. The agreement of itself did not create the right of the heirs but did authorize certain steps to be taken which altogether brought into being the rights of the heirs to an allotment. "It contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property and only as it was carried into effect were individual claims to be fastened upon them." *Sizemore v. Brady, supra.*

What were the various preliminary acts that preceded any investiture of individual rights? Enrollment of the citizen *entitled under the law* in whose right the allotment was to be made, was one of them. Allotment of the land to the one designated by statute was another. In the case of *Sizemore v. Brady*, the plaintiff in error attempted to establish the principle that section 28 of the Creek Agreement created the right in the heirs of a dead Indian which descended and attached to the heirs by virtue of the act alone. In other words, that the act was a grant *in praesenti* regardless of the allotment; but the Supreme Court held otherwise and said that the allotment is just as essential as any other of the steps "to precede any investiture of individual rights." We are admonished then by the Supreme Court that only by compliance with the terms of the act are rights created. And as the necessity for the allotment was in issue, and was held to be essential, we must examine further to see what Congress said would constitute an allotment which would create an "investiture of individual rights."

The act said that "if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, *shall descend to*

his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to *them accordingly.*" The allotment to the persons designated by the statute was essential. If the allotment was not made to the right persons, there was no allotment, because such allotment was not authorized. An allotment to Barney Thlocco did not satisfy the requirements of the statute, because there was no such person as Barney Thlocco after the enactment of the Creek Agreement, and a pretended allotment to Barney Thlocco was a nullity, being an allotment to a fictitious person—to no one; and was not authorized by Congress.

It has been determined by this court that even where an allotment had been selected under the Curtis Act and the allottee died before the Creek Agreement became effective, his rights died with him; that he left no estate in the lands so selected; and that it took the operation of section 6 of the Creek Agreement confirming allotments previously made to create an estate in his right for his heirs. It was so held in the case of *Woodward v. deGraffenried*, 238 U. S. 284.

To the same effect are:

Lynch v. Franklin, 233 U. S. 269;

Barnett v. Way, 29 Okla. 780;

La Roque v. United States, 239 U. S. 62.

In the case of *United States v. Hawkins*, 217 Fed. 11, recently decided by the Circuit Court of Appeals for the Eighth Circuit, it was held that a patent which issued to an Indian who is dead conveyed no title whatever. It appears in that case that the Indian in whose right the patent issued was not entitled to enrollment, but the conclusion of the court is predicated quite as much upon the fact that the Indian was dead. This was emphasized by the dissenting opinion of Mr. Justice Hook, who maintained that the mere fact that the grantee named in a deed was dead did not make the conveyance entirely void. This case was decided upon the authority of *Moffatt v. United States*, 112 U. S. 31, where it was said that "a patent to a fictitious person is, in legal effect, no more than a declaration that the Government thereby conveys the land to no one."

The discussion by the court of the fact that the Indian James Hawkins died before April 1, 1899, related only to the defense of innocent purchaser invoked by certain persons who claimed that they had a right to rely on the judgment of the Dawes Commission, finding that James Hawkins was entitled to enrollment.

This case was distinguished from *United States v. Jacobs*, 197 Fed. 707, where a compliance with section 28 of the Creek Agreement, by making an allot-

ment direct to the heirs in the manner provided by law, was held effective to pass the title of the Creek Nation to such heirs, though in both cases the Indians in whose right the allottees claimed were not entitled to enrollment. Allotment to the heirs in the *Jacobs* case was held to be such compliance with the authority given the Commission as protected innocent purchasers because, as the court said, the title to the land undoubtedly passed; whereas in the *Hawkins* case the failure to follow the statute, and an allotment made to a dead Indian, was so far outside the authority of the statute and any legal sanction under the well-known principles of law that no color of title even passed, and the court said, "the good faith of the purchaser cannot create a title where none exists."

In the one case the allotment was complete and in the other it was not. The fundamental distinction between these cases is the allotment in conformity with the statute to the heirs in the one case, which passed title, and the attempted allotment to an Indian not in being in the other, which passed nothing.

The Commission itself recognized this fact, as appears from that part of the report of the Commission for the year ending June 30, 1905, on page 31, where it is said:

“ In conveying lands to the individual members of the tribe it is the practice, in cases where the allottee is dead, to issue the conveyance to his heirs. It is, therefore, essential that the Commission continue to record the death of persons whose names appear upon the final rolls, in order that the information may be available for the use of the Creek Land Office in the preparation of patents.”

The case of the *United States v. Hawkins*, 217 Fed. 11, is absolutely convincing on this point, and to remove all doubt as to what the court meant it is only necessary to read the dissenting opinion of Justice Hook, as follows:

“ I doubt that a deed or patent to a dead man is so utterly void that his heirs can convey no valid interest to an innocent purchaser. The ancient ceremony of the transfer of land which required a living grantee does not prevail in this country, and the rule based upon it is giving way. So much for the case of the lessees.”

In *Baker v. Lane* (82 Kan. 715, 28 L. R. A. (N. S.) 405) the Supreme Court of Kansas said:

“ A deed to a person not living and his heirs is void, there being no person to take under it. (Citing) 1 Jones, Real Property in Conveyancing, section 223; Washburn, Real Property, 6th ed., section 2121; Devlin Deeds, 2d ed., section

123; *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543; *Miller v. Chittendm*, 2 Iowa 315; *Neal v. Nelson*, 117 N. C. 393, 53 Am. St. Rep. 590, 23 S. E. 428."

In the case of *Morgan v. Hazelhurst Lodge*, 53 Miss. 665, paragraph one of the syllabus reads:

"Where in the premises of a deed A is stated to be party of the first part, and M party of the second part, the *grant* and the *habendum* being to M and his heirs if M is not *in esse* at the time of the execution of the deed, it is void."

The court said in the opinion:

"In *Hunter v. Watson*, 12 Cal. 363-376, it was assumed by the court that the deed to Knox, having been made after his death, must be laid out of the question as a nullity. That made to Knox and his heirs, 'heirs' was not a word of purchase to carry the estate, but a limitation defining and qualifying the title. That principle is laid down without restriction in 2 Washburn on Real Property 239. In *Jackson v. Phipps*, 12 Johns. 418, the understanding was that Joseph should give to Aaron Phipps a mortgage. Joseph signed, sealed and acknowledged the instrument; but Aaron having died before there had been a delivery to and acceptance by him, or any person for him, it was held inoperative, although the son and heir accepted it afterwards. *Johnson v. Dunlap*, 1 Johns. Cas. 114, is in principle and

some of its features like this case. The deed was fully executed with a subscribing witness; but it was agreed that the grantor should retain the deed until the consideration money should be fully paid, 'and Wareham, the grantee, said he would not take it until the money was paid.' In this state of affairs the grantee died. The title failed to pass, because there had been no delivery. KENT, J., thought there was an equitable lien, but that it could not be set up at law as a legal estate.

" There must be a real grantee. A deed to a fictitious person is void. *Muskingum Turnpike v. Ward*, 13 Ohio 120. A deed to A or B is void by uncertainty; the grantor not having expressed his intent, it is impossible to determine which shall take. Bacon Abr. 'Grant' C but a deed to A or his heirs is good; for the intent is plain that the title shall vest in A if living, and if not, then in his heirs or devisees. *Ready v. Kearsley*, 14 Mich. 215, 225."

In *Neal v. Nelson*, 117 N. C. 393, 23 S. E. 428, the court said:

" Viewing the sheriff's deed as an attempted conveyance executed to W. A. Lash, Sr., after his death, it would be obviously void for want of a grantee, and for failure to deliver. * * * A deed to a person not then living 'and his heirs' is void because the word 'heirs' is a word of limitation, and not of purchase. *Hunter v. Watson*, 12 Cal. 363."

Upon an examination of the statutes relating to the allotment of the Creek lands it is clear that Congress provided definitely for two kinds of allotments—one to the living citizens and the other to the heirs of deceased citizens. And only in the event that allotment was made in the manner prescribed by law could title pass. Having provided for allotment of land to the heirs of deceased members of the tribe—that was the only manner in which the heirs could acquire the title where the deceased member had died before allotment. The contrary view does not follow by anything said by this court in the case of *Skelton v. Dill*, 235 U. S. 206, where it was stated:

“ Two or three years after the child's death his name was regularly placed upon the roll of Creek citizens by the Commission to the Five Civilized Tribes, and the lands in question were duly embraced in an allotment made on his behalf. A deed for them was also issued in his name, and this, by operation of law, vested the title in his heirs.”

But this was not a decision that allotment to a dead Indian passed title to his heirs. The point was not at issue in the case. The title created in this case was ~~not~~ the title upon which both parties relied. The court was merely reciting the steps taken in making the title claim by ^{ed} ~~other~~ parties leading up to the controverted questions of law to be decided. No

one familiar with the law will claim that the court has thereby decided this question, or that the court is in any way bound by this statement when a controverted question on that point is presented. In this case, moreover, the land was selected September 12, 1905, by the heirs of Archie Hamby, and patent issued in the name of Archie Hamby on May 24, 1907, under authority of section 5 of the Act of April 26, 1906, to make the patents after that date in the names of such deceased members.

The court merely found that section 5 of the Act of April 26, 1906, authorized the issuance of patent in the name of deceased allottees in lieu of the former necessary method of having patents run to the heirs.

Congress knew that under prior legislation there was no authority for allotting to dead Indians and recognizing that situation provided in the Act of April 26, 1906, "that all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective the title to the lands described therein shall inure to and vest in his heirs." This is legislative construction of the prior statutes that support our view of the matter.

The legislation providing for the allotment of lands is too well known to the court to make it necessary to set it out here. It is sufficient to refer to the fact that by section 3 of the Original Creek Agreement, it is provided that "all lands of said tribe except as herein provided shall be allotted among the citizens of the tribe by the said Commission so as to give each an equal share of the whole in value as nearly as may be." Who were citizens of the tribe and entitled to be enrolled and allotted was to be answered by the provisions for enrollment of the members of the tribe. Only citizens who were living on April 1, 1899, and otherwise qualified were entitled to be placed upon the Creek roll and any person who was not living on April 1st, 1899, was not entitled to be enrolled on the Creek roll; and no law of estoppel prior to March 4, 1907, withholding the hand of the Secretary from correcting the enrollment of one so improperly placed upon the roll, for the purpose of validating such illegal enrollment, is warranted by the letter or the spirit of the legislation upon this subject.

It was the duty of the Secretary to correct errors in enrollment and he was vested with authority until March 4, 1907.

It has been held by this court that until authority was expressly taken from the Interior Depart-

ment the power remained to correct errors and the court has refused to enjoin the Secretary from making corrections where such error had been committed. In the case of *United States ex rel Lowe v. Fisher*, 223 U. S. 95, 56 L. ed. 364, this court said:

“ Two propositions are however urged by relators; * * * 2 that the Secretary having on November 16, 1904, approved a list of Cherokee freedmen, containing the names of relators, on the ground that their ancestors had complied with the provisions for return to the nation, had no power to cancel their names. * * *

“ The relators, however, say that ‘the Dawes Commission, as is matter of official history, did not adopt the tribal rolls as confirmed, but proceeded to try the rights of persons to be on the tribal rolls, and the controversy ensued continued and the rolls were not closed until March 4, 1907, Congress refusing to heed administrative appeals for more time’ * * * .

“ It is manifest from this act that the contention of relators that the tribal rolls were to be treated or accepted as absolutely confirmed is unsound. * * *

“ Relators nevertheless insist that notwithstanding they were not entitled to be placed upon the rolls, yet, having been placed there, they cannot be taken off by the Secretary of the Interior * * * .

“ A roll made complete, it is argued, by legislation, excludes the idea of correction by an

executive officer; and, besides, it is urged that the certificates of allotment carry with them the sanction of the law's declaration that they shall be 'conclusive evidence' of the rights of the allottee. Physical possession of the lands described in them is to be given, it is pointed out, and, describing the conditions which were created and which would be disturbed by an exercise of power to recall them it is said that 'from the date of selection of their allotments under the law allottees did lease their allotments for grazing, oil and gas, mineral, and other purposes.' And, further, that 'allottees also, from the same date, created town sites where practicable, and sold town lots, with their title resting in their allotment selections or certificates,' and that such transactions have been declared valid by the Supreme Court of Oklahoma, citing *McWilliams Invest. Co. v. Livingston*, 22 Okla. 884, 98 Pac. 914; *Godfrey v. Iowa Land & T. Co.*, 21 Okla. 293, 95 Pac. 792.

“ We recognize the strength of the considerations urged, but it certainly did not militate against the congressional policy of the allotment of lands to retain in the Secretary of the Interior the power of revision and correction until the final moment when jurisdiction was expressly taken from him as provided in § 2 of the Act of April 26, 1906 (34 Stat. at L. 137, chap. 1876), that is, the 4th day of March, 1907. That Congress could give such power to the Secretary of the Interior is settled. *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722, and *Wallace v. Adams*, 204 U. S. 415,

51 L. ed. 547, 27 Sup. Ct. Rep. 363. *In all the legislation providing for the making of the rolls care is observed to prevent or correct mistakes and to defeat attempts at fraud.*”

In the case of *Cherokee Nation v. Whitmire*, 223 U. S. 108, in speaking of an investigation of a roll prepared by administrative officers, this court said:

“ It must be borne in mind that important rights were involved and no good reason could be urged against, or serious consequences apprehended from, another investigation. Those who were entitled to be enrolled could again establish their right. Those who were not so entitled, and who had got on the rolls either by mistake or fraud, had no legal ground of complaint. However, we are not required to consider the reasons which induced Congress to direct that a roll be made by the Dawes Commission. Congress had the power and as we have decided, exercised it.”

The same logic applies here. If Barney Thlocco was entitled to be enrolled, his heirs cannot be hurt by an inquiry into that fact; if he was not entitled to be enrolled, they have no cause of complaint and the establishment of that fact is essential to the rights of the other members of the tribe.

Section 5 of the Act of April 26, 1906, was not intended to repeal prior legislation or to introduce

any new theory or plan in the method of allotment or of passing title out of the Creek Nation into the members of the tribe. Prior to that date, under the law in force, it had been provided that patents should be delivered to allottees by the chief of the tribes. This provision changed the method of delivery of patents and reposed that duty with the Secretary of the Interior, but, at the same time, and by reason thereof, vested him with the responsibility and duty of ascertaining who were entitled to receive the patents, for without this investigation and knowledge he could not perform the duty with which he was charged—to deliver patents to those who were entitled to receive them.

Nor was it the intention of Congress by this section to convey title to any one who was not entitled under all former laws to receive it. The section provided for the recording of patents *legally* executed to *legal* allottees, and was not intended to make a title where none existed, nor to validate an allotment which was invalid because not made in compliance with the statute, nor was it intended in any particular to vary the requirements of the law then in force necessary to establish the allotable status of any members of the tribe. The intent was that *thereafter* the recording of patents should take the place of delivery; it was to make recording effective as to

allotments only with reference to allotments legally made, and was not intended to disturb the power of the Secretary to correct his mistakes or to correct the record of any allotment illegally made.

The resolution adopted by the Commission to the Five Civilized Tribes on May 24th, 1902, under which the arbitrary selection of allotment was made for Barney Thlocco on June 30, 1902, is without authority of law and the acts thereunder are void.

The allotment certificate issued to Barney Thlocco on June 30th, 1902, does not pretend to be issued on any selection made by him, or by any authority conferred by Congress upon the Commission. It reads in part as follows:

“ Allotments of land and homestead designations, as hereinafter described, are hereby made to the following named persons; in accordance with the resolution of the Commission adopted May 24, 1902, *viz.*: Roll No. 8592; No. Certificate 16986; Barney Thlocco—Sub-division of NW4, Sec. 9, Twp. 18, Range 7, Area 160 Acres.”

The resolution of May 24, 1902, referred to and under which this allotment is made reads as follows:

“ MUSKOGEE, INDIAN TERRITORY,

“ May 24, 1902.

“ A session of the Commission to the Five Civilized Tribes was held at its general office at

Muskogee, Indian Territory, on the above date, there being present Commissioners Bixby, Needles, and Breckenridge.

* * * * *

“ WHEREAS, section three of the Act of Congress approved March 1, 1901 (31 Stat. 861), known as the Creek Agreement, provides that:

“ ‘All lands of said tribe except as herein provided shall be allotted among the citizens of the tribe by said Commission so as to give to each citizen an equal share of the whole in value as nearly as may be,’

“And that

“ ‘ * * * there shall be allotted to each citizen one hundred and sixty acres of land,’

“and whereas, section seven of said act provides that

“ ‘ * * * each citizen shall select from his allotment forty acres of land as a homestead,’

“and that

“ ‘ * * * if for any reason such selection shall not be made for any citizen, it shall be the duty of said Commission to make selection for him.’

“ And, WHEREAS, numerous citizens of said nation have made no selection of land for allotment and others have made selection of only a portion of the land to which they are entitled, and

“ WHEREAS, after due notice given, many citizens of said nation have failed to make a *selection of a homestead*, therefore, be it

“ *Resolved*, That the acting chairman is hereby authorized and empowered by and on behalf of the Commission to allot to each citizen out of the lands of the Creek Nation not heretofore allotted or selected such an amount of land of at least average quality as will make the total allotment of each citizen one hundred and sixty acres, and to select a homestead for such citizens in all cases where a selection of a homestead has not been made by or on behalf of said citizen:

“ *Provided*, That the allotment and selection of homestead so made for a citizen shall include improvements shown by the plats or records of the office to belong to said citizen.

“ On motion of Commissioner Breckenridge, duly seconded, the same was unanimously adopted.

* * * * *

“ There being no further business before the meeting the Commission on motion was adjourned.

Attest:

A. L. AYLESWORTH,

Secretary.”

* * * * *

TAMS BIXBY,

Acting Chairman.

The authority of the Commission to allot lands to the members of the tribe is contained in section 3 of the Act of Congress of March 1, 1901, reading as follows:

“ All lands of said tribe, except as herein provided shall be allotted among the *citizens of the tribe* by said Commission so as to give each an equal share of the whole in value, as nearly as may be, IN MANNER FOLLOWING: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values; and any allottee receiving lands of less than such standard value may, at any time, select other lands, which, at their appraised value, are sufficient to make his allotment equal in value to the standard so fixed.

“ If any citizen select lands the appraised value of which, for any reason, is in excess of such standard value, the excess of value shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds of the tribe until all other citizens have received lands and money equal in value to his allotment. If any citizen select lands the appraised value of which

is in excess of such standard value, he may pay the overplus in money, but if he fail to do so, the same shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds until all other citizens shall have received lands and funds equal in value to his allotment; and if there be not sufficient funds of the tribe to make the allotments of all other citizens of the tribe equal in value to his, then the surplus shall be a lien upon the rents and profits of his allotment until paid."

The resolution of the Commission to arbitrarily allot lands recites that whereas said section provides that "all lands of said tribe except as herein provided shall be allotted among the citizens of the tribe by said Commission so as to give to each citizen an equal share of the whole in value, as nearly as may be, and that there shall be allotted to each citizen 160 acres of land." The resolution then proceeds to quote from section 7 of the act that, whereas said section provides that "each citizen shall select from his allotment 40 acres of land as his homestead, and that if for any reason such selection shall not be made for any citizen, it shall be the duty of said Commission to make such selection for him."

Upon reading sections 3 and 7 referred to it will be seen that the Commission did not confine itself to

the authority granted by these provisions. In their recital as to the authority contained in section 3 they omitted the direction that the allotment shall be made "in manner following: There shall be allotted to each citizen 160 acres of land * * * the boundaries to conform to the Government survey * * * which may be selected by him so as to include the improvements which belong to him." This was an express direction that the allotment was to be made upon the selection of the citizen. This idea is carried throughout the legislation referring to allotments, and in numerous places reference is made to the selection so to be made by the citizen. It appears throughout the Original Creek Agreement that selection by the Indian was a necessary step in the allotment of land. Section 3 of the original treaty provides that the allottee may *select* his allotment so as to include his improvements. Section 4 of the same treaty provides that the allotment for minors may be *selected* by the father, mother, or guardian, and grants to the Commission the right to *select* for prisoners, convicts, and aged and infirm persons. Section 5 provides that from other lands in his possession the allottee may *select* allotments for himself and his family. Section 7 requires that each Indian shall *select* from his allotment 40 acres as a homestead. Section 23 provides that a patent shall be executed and delivered to the citizen who has *selected* or may here-

after *select* his allotment, which is not contested. Section 37 provides that a Creek citizen may rent his allotment when *selected* for a term not exceeding one year. Section 38 provides that after any citizen has *selected* his allotment he may dispose of any timber thereon. In the supplemental treaty provision is made for curing erroneous selections made by citizens, and section 19 of the same treaty provides that after the citizen has made his *selection* the Secretary shall place him in possession of his allotment. Section 7 of the Act of May, 27, 1908, provides that as soon as practicable after the sixty days' contest period expires, after *selection*, the Secretary shall cause a patent to issue.

The Original Creek Agreement outlined a plan comprehensive in its terms for the allotment of lands among those found to be entitled to enrollment. The enrollment was predicated upon section twenty-one of the Curtis Act with the proviso that only those who were alive on April 1, 1899, should be enrolled. The acreage each individual Indian should receive for his own allotment was fixed. The execution of deeds by the Principal Chief and the Secretary of the Interior was provided for in section twenty-three. The acceptance of the deeds by the allottee by which he would relinquish whatever right and title he had in the other tribal lands being allotted in severalty un-

der the terms of the act, was provided for. In other words, the scheme of allotment was sufficient, if followed by the administrative officers, to give each enrolled Indian, entitled to receive an allotment, his proper share of the tribal lands, and in the manner of the allotment and acceptance of the deeds by him, gain his consent to the allotment in severalty of all the lands of the tribe.

Despite this comprehensive scheme, the result of much labor and effort on the part of Congress, directing how the work must be done, on May 24, 1902, the Commission to the Five Civilized Tribes adopted the foregoing resolution, thereby AMENDING the Act of Congress, giving the Commission the right to select homesteads for those, who having made selection of an allotment, neglected to apply for a particular tract to be set aside for a homestead. This amendment by the Commission of the Act of Congress gave to the Commission the additional right to select an entire allotment for those who on May 24th, 1902, had failed to appear and make a selection of lands for themselves, provided, of course, that Congress conferred upon the Commission to the Five Civilized Tribes the power to legislate. It is provided in the Act of Congress that living citizens may select their own allotments; that the selections for minors shall be made by guardians; that selection

for incompetents, prisoners, convicts, aged and infirm persons, shall be by guardians, curators, or suitable person akin to them. This direction to the Commission is plain in its provisions and the language used is broad enough to eliminate discretion and certainly it does not confer upon the Commission the power to legislate and amend the Acts of Congress with regard to the tribal property.

In the case of *Daniels v. Wagner*, 237 U. S. 547, 56 L. ed. 1102, this court in discussing the exercise of arbitrary and unwarranted discretion by the officers of the Land Office, says:

“ That although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, *since every command which it has expressed on this subject has been disregarded, and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law. When the true character of the proposition thus becomes fixed it becomes unnecessary to go further to demonstrate its want of foundation. And the inherent vice which thus clearly appears from the mere statement of the proposition when reduced to the ultimate conceptions which it involves is not relieved by the suggestion that the*

action taken in this case by the Department rested not upon the assumption that such discretion arose because of the primary mistake made by the local land officers concerning the location entry and the allowance of the filing of claims which were subsequent in date. We say this because thus seemingly to limit the discretionary power exerted, would in our opinion, aggravate its manifest unsoundness, for the power as thus qualified would come to this: That the commission of a wrong by the officers of the Department in disobeying the Act of Congress and in denying to an individual a right expressly conferred upon him by law would become the generating source of a discretionary power to make the disobedience of the law lawful and the taking away of the right of an individual legal."

In discussing section 7 of the Act of March 1, 1901, the Commission assumed the words "if for any reason such selection be not made for any citizen it shall be the duty of said Commission to make such selection for him" to be authority to make the selection. Just what was referred to by this language is to be determined upon by reading the remainder of the sentence which precedes that, as follows:

" Each citizen shall select from his allotment forty acres of land as a homestead, which shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, condi-

tioned as above: *Provided*, That selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who cannot select for themselves, may be made in the manner herein provided for the selection of their allotments; and if, for any reason such selection be not made for any citizen it shall be the duty of said Commission to make selection for him."

It is plain to be seen that the direction to the Commission contained here is that as to those who could not make selection of their homesteads out of their allotments for themselves, because of personal disability, such as those enumerated there—"minors, prisoners, convicts, incompetent, aged and infirm persons"—selection should be made in the manner herein provided for the selection of their allotments. This, then, refers us to section 4, which provides that "an allotment for a minor may be selected by his father, mother, or guardian, and allotments for prisoners, convicts, aged and infirm persons by their duly appointed agents, and allotments for incompetents by guardians, curators or suitable person akin to them." Though it was made the duty of the Commission to see that selections made by such personal representatives were made for the best interests of such persons, it did not vest the Commission with authority to make the selections.

Then, in section 7, in directing that if for any reason such selection be not made for any citizen, that is to say, if the homestead be not selected for "minors, prisoners, convicts, incompetents, aged and infirm persons who cannot select for themselves," it then devolved upon the Commission to make such selection, that is, to select the homestead for persons of this class who were under a disability. This is the full extent of the authority granted the Commission to make selections, and we have no hesitation in saying that Congress never intended to vest authority in the Commission to make any selection for any member of the tribe except homesteads for the classes we have mentioned, and the Commission to the Five Civilized Tribes exceeded its authority in making the selection arbitrarily to Barney Thlocco. That neither Congress nor the Secretary of the Interior intended to confer such jurisdiction upon the Commission appears from the rules promulgated October 7, 1898, by the Secretary of the Interior for the guidance of the Commission, when the land office was opened under the provisions of the Curtis Act (Act of June 28, 1898). After quoting so much of the act as applies to allotments the Secretary in these rules, first printed in the sixth annual report of the Commission to the Five Civilized Tribes for the year 1899, and found on pages 81, 82 and 83 thereof, says:

“ In order, therefore to give effect to the provisions of said act according to its design, and to enable every member of each tribe to select and to have set apart to him lands to be allotted to him in amount approximating his share as aforesaid, the Commission to the Five Civilized Tribes is instructed, as a means preparatory to and in aid of the duty of allotment of the lands of said tribes required of it by said act, to proceed as early as practicable to establish an office within the territory of each tribe, provided with proper and suitable records, including a copy of the United States survey of the lands of the tribe, for the purpose of registering each and every selection of lands made by any member of the tribe for his allotment; and in order to make such selection of lands by any member of any tribe effective and valid such member, or the head of each family, shall be required to appear in person at the office within his tribe and to make application to one of the members of said Commission or to some one by said Commission authorized to act for it in performing such duty, to have set apart to him the lands selected by him for himself and his wife and minor children; and such application shall be prepared by some member of said Commission, or the person so authorized, and the applicant shall be required to therein make oath that he has, in person actually been upon the lands so selected by him, and is fully informed as to the location of the same and the character of the soil; that the land is suitable for a home for himself and family; that he has in good faith selected such lands, and will accept same in allotment to himself and

family; that no part of same is lawfully held by any other member of the tribe; and thereafter he may occupy, control and rent the same for any period not exceeding one year by any one contract until lands are in fact allotted to him under the terms of said act, and will be protected therein by the Government from interference by all other persons whomsoever. Selections may be made for orphans, incompetents, and prisoners by guardians and relatives.

“ Any selection of lands otherwise made by any member of any tribe, and any rent contract made for any longer period than one year, or for other than the current year, shall be void.”

These rules promulgated by the Secretary of the Interior for the guidance of the Commission have never been repealed or recalled. An amendment was added by the Secretary on April 7, 1899, which did not materially change or modify the right of selection. The rule above quoted was made while the Curtis Act was in effect, and it is well to note that no mention is made therein of a right of selection in the members of the tribes. The Original Creek Agreement, which was in force when the resolution of the Commission to arbitrarily allot the members of the Creek Nation was adopted, did give the right of selection, and with a clearness and directness not to be mistaken makes provision for all classes of citizens and designates persons who shall make selec-

tions for those who by reason of any disability might be unable to make selection in person.

This departmental construction of the “right to make selection” and the rule above quoted is binding upon the Department and upon the Commission, and in the well-considered opinion of Justice PITNEY, of the Supreme Court, in the case of *Woodward v. de Graffenreid*, 238 U. S. 234, decided June 14, 1915, these rules are set out in a foot-note to the opinion and the “right to select” is emphasized by italics.

In a very able discussion of the powers conferred upon the Commission to the Five Civilized Tribes by the Acts of Congress, Judge SANBORN, of the United States Circuit Court of Appeals for the Eighth Circuit in the case of *Malone v. Alderdice*, 212 Fed. l. c. 671, says :

“ It is also true in making the allotments it was essential to the discharge of its duty that the Commission should decide at the time each citizen or freedman made his selection of his allotment, and also at the time he made his selection of his homestead, whether or not he was a minor in order to determine whether his selection must be made by himself or by another. But it was also indispensable for it to determine at such times in each case and for the same reason whether or not the applicant was a prisoner, a convict, an incompetent or an aged or infirm person.”

The court here recognizes the right of the citizen to make a selection of an allotment of lands as provided by the Act of Congress. If Congress had intended that the right to make selections for citizens should be conferred upon the Commission, then it would never have been so specific in its directions as to how selections should be made by minors, prisoners, convicts, incompetents, and aged or infirm persons.

Section 23 of the Act of March 1, 1901, provided that "any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds of lands reserved from allotment." The allotment of lands involved some of the features of a contract. The lands of the Creek Nation were tribal lands and title vested in the individual members of the tribe only when the steps were taken provided for by law. And it is clear that an arbitrary allotment to a member of the tribe did not meet the requirements of the law, which require that each citizen might select his allotment and receive the patent therefor. This theory was recognized by the Supreme Court of the United States in the case of *Choate v. Trapp*, 224 U. S. 665, 56 L. ed. 941, which we refer to more fully herein.

In the case of *Morris v. United States*, 174 U. S. 196-359, 43 L. ed. 946, this court in discussing the action of the Land Office said:

“ Besides the facts of the case show that Congress is asserting title and dominion over these lands for public purposes. Whether Congress should exercise its power over these reserved lands by dredging and thus restoring navigation and fishery, or by reclaiming them from the waters for wharfing purposes, or to convert them into public parks could only be determined by Congress, and not by the functionaries of the land office.”

The case at bar is in many respects similar to those arising from the decisions of the Land Office. The distinction is found in the provisions of the Act of March 1, 1901, providing for the acceptance to operate as a relinquishment of the interest of the allottee in other tribal lands, and as necessary to pass the legal title to and vest it in him. It is too well settled in the public land cases to need the citation of authority, that where the officer acts without authority the grant is void. We insist that the Commission to the Five Civilized Tribes was never vested with authority to make an arbitrary allotment to any dead Indian. The acts of the Commission in so doing were void.

And it is obvious that if the Commission had observed the direction of Congress and made allotments only to those who selected them, the contention in this case would never have arisen, for there would have been no allotment to Barney Thlocco. It was in the class of arbitrary allotments that these mistakes were possible, and not only possible, but very likely to, and did, frequently occur. But if, perchance, the enrollment or allotment had been made to the heirs of Barney Thlocco upon the false representation of any one interested that Barney Thlocco was living on April 1, 1899, the Government, upon discovery of the fact that he was not then living, could have effectively based its suit upon the fraud thus committed, which it was unable in this case to charge.

In the case at bar the disposition of certain lands, held in trust for the Indians was undertaken by Congress. The legislation on the subject directs that certain things be done. In the case of *Sizemore v. Brady*, *supra*, it is said that: "The lands and funds to which it related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them." If the Commission in the exercise of an unlimited and undefined discretion attempted to fasten individual claims upon any portion of the tribal property, such action has no

force or effect in divesting the title of the tribe from such land.

Section five of the Act of April 26, 1906 (34 Stat. at L. 137), cannot operate upon a void act of the Department and create a title where none existed prior to the passage of the act. This section was passed long after the deeds to Barney Thlocco sought to be canceled by the Government were recorded. At the time of their record it was provided that title did not pass until the patents were accepted by the allottee. The patents to Thlocco remain in the office of the Commission to the Five Civilized Tribes. The attempt to deliver them failed for the good and sufficient reason that he was dead. His heirs did not apply for them for the reason, that knowing he died before April 1st, 1899, they would not be entitled to an allotment in his right, and they now seek to claim the benefit of allotment without furnishing the proof that he was living on April 1st, 1899. Before this act became effective the record discloses that the Commission to the Five Tribes had started an investigation as to whether or not Thlocco was living on April 1st, 1899, and entitled to enrollment and allotment. Their conclusion based upon sufficient evidence to support it was submitted to the Secretary and that official on December 13, 1906, ordered the name stricken from the roll. If the contention of the

heirs of Thlocco be sound, then, even though the Secretary had found that Thlocco died prior to April 1st, 1899, and was therefore not entitled to enrollment, under the terms of section five it became and was his duty to see that the patents to this person not entitled to receive the same were delivered to his heirs for section five of the Act of April 26, 1906, says: "and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same." It has been repeatedly held that the tribe was the ward of the government and that in allotting their land in severalty the United States was charged with the duty of distributing a trust estate to those entitled to receive the same and here we would have the Government, acting as trustee and perfecting the title in those who they have found were not entitled to any benefit of the acts authorizing allotment. On August 25th, 1904, more than two years before the title passed to Barney Thlocco under the contention of the appellees, the Commission to the Five Tribes notified the Secretary that they had information that Thlocco died prior to April 1, 1899. They were authorized to make further investigation and report the result. This was done and testimony was taken on October 21, 1905, and November 14, 1905, showing that he died in January, 1899. The heirs of Barney Thlocco never appeared to claim or

assert any interest in this allotment until 1913. This was more than fourteen years after his death. There can be no innocent parties to suffer in this case for all conveyances made by the numerous, reputed heirs of Barney Thlocco were made when it was not only a matter of public record but of common knowledge that the Government and the Creek Nation were insistent in their claim that he died before April 1, 1899, and was therefore not entitled to allotment. If he was in fact alive after that date the heirs are not hurt. If he in fact died before April 1, 1899, then a wrong has been perpetrated upon every citizen of the Creek Nation unless this court grants relief and permits this fact to be established. The judgment of the Commission so strongly urged as conclusive, is lacking in so many of the elements necessary to constitute a final adjudication, in a matter where the rights of a dependent people that this great Government elects to treat as its wards are involved, that if any doubt exists it should be resolved in favor of the Creek Tribe of Indians and the evidence offered in support of the contentions made in the bill be admitted.

We respectfully submit that for the reasons we have discussed in addition to other arguments made in this case, the three questions certified by the Circuit Court of Appeals should be answered in the affirmative.

GRANT FOREMAN,

JAMES D. SIMMS,

As Amici Curiae.



APPENDIX.

Ind. Ter. Div.
2278 — 1902.

DEPARTMENT OF THE INTERIOR.

OFFICE OF THE ASSISTANT ATTORNEY GENERAL.

Washington, D. C.,

April 24, 1902.

The Secretary of the Interior,

SIR:

The Department has held that under the agreement with the Creek Indians ratified by the Act of March 1, 1901 (31 Stat. 861), Creek citizens may not rent the lands selected by them for allotment for a longer period than one year until deeds shall have been issued to them. It is now urged that this construction should not obtain but that said agreement should be construed as authorizing the leasing of such allotments without restriction as to the length of the term, as soon as the selection has been made and certificate issued thereon and the matter has been submitted for my opinion.

Paragraph 37 of said agreement contains a provision as follows:

Creek citizens may rent their allotments, when selected, for a term not exceeding one year, and after receiving title thereto without restriction. * * *

Under that agreement each citizen was to receive an allotment of one hundred sixty acres of land to be selected by or for him in the manner prescribed therein and the principal chief was to execute, in due form, and deliver to each citizen so selecting an allotment, "a deed conveying to him all right, title and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate." This deed is to be approved by the Secretary of the Interior, which approval is to serve as a relinquishment of all right, title and interest of the United States in the land described therein. The acceptance of the deed by the allottee is to be taken as an assent on his part to the allotment and sale of the lands of the tribe, as in said agreement provided, and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds of the land reserved from allotment. Not until such a deed is executed, approved and accepted is the transaction completed and the title vested in the allottee. The completion of the transaction was evidently the point of time referred to in the expression "and after receiving title thereto without restriction."

Upon making selection the applicant is given a certificate stating that he has selected the land described, and this is the allotment certificate mentioned in the agreement. It is evidence that the person to whom it is given has selected an allotment. Thereafter and until title passes to him, he may, under the first clause of paragraph 37, rent his allotment for a term not exceeding one year. Theoretically, the certificate would issue immediately upon the selection being presented and the provision permitting the renting of allotments must be read with this theory in mind. There would be no room for the operation of the first clause if the contention were correct that it refers only to the time between the presentation of a selection and the issuance of an allotment certificate. It may be that in administering this law it has been found advisable to delay the issuance of a certificate until it can be ascertained whether such selection should be allowed but such delay would be too short to make a permission to rent during that time of any practical benefit to the allottee. That delay was not, however, contemplated by the agreement and therefor the fact that there is such a delay does not constitute a valid argument in support of the contention that the first clause of paragraph 37 relates to the period covered by it.

I am of opinion that the phrase "after receiving title," should be construed as referring to the time when title actually passes by the delivery and acceptance of the deed provided for in said agreement.

The paper submitted is herewith returned.

Very respectfully,

WILLIS VANDEVENTER,

April 24th, 1902,

Assistant Attorney General.

Approved:

E. A. HITCHCOCK,

Secretary.

1—480.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., April 12, 1917.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true and exact copy of the original as it appears of the record and files of this Department.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[Seal Department of the Interior.]

ALEXANDER T. VOGELSANG,
First Assistant Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, August 23, 1916.

D-40271.

In re HEIRS OF JEMIMA.

Application for Allotment in Creek Nation. Motion Denied.

Motion for Rehearing.

Motion for rehearing of departmental decision herein, of July 24, 1916, has been filed by Mr. R. C. Allen, National Attorney for the Creek Nation. The correctness of the conclusion reached by the Department is not questioned, but it is urged in support of the motion that the language used in

said decision might be construed as expressing the opinion of the Department on a state of facts different from that presented in said case.

The motion first challenges that part of the decision which deals with an allotment arbitrarily made by the Commission to the Five Civilized Tribes, and it is contended that before such an allotment can become effective as a segregation of the lands from the domain of the Creek Nation the allottee must accept the patents. It was found by the Department that the parties claiming to be the heirs of Jemima, and in whose behalf the application was originally filed, had fully accepted the allotment set apart in the name of Jemima and the question of the validity of an allotment, patents to which had not been accepted by the allottee or his heirs, was not before the Department and what was said by it was not applicable to such a state of facts.

Exception is also taken to the language of the decision dealing with the question of the validity of an allotment made in the name of a deceased person. What was said in this connection had reference to the validity of an allotment made to a duly enrolled citizen of the Creek Nation who was entitled to an allotment therein and whose heirs accepted the allotment. The holding of the Department in this connection has no reference to an allotment to a citizen who, for any reason, did not have an allottable status.

The question of the validity of an arbitrary allotment in the absence of the delivery of the patents conveying the land to the allottee was not before the Department, as it was found in the decision complained of that the patents in this case were properly delivered and duly accepted by the parties who claimed to be the heirs of the deceased. This question was therefore not decided. In this connection the Department said:

If acceptance is essential, ample proof thereof is found in the conduct of the present applicants in voluntarily intervening in an action now pending in

the district court of Creek County, Oklahoma, which involves the title to the land in question, and claiming title thereto by virtue of the issuance of the certificate and deeds above referred to.

This language must, of course, be construed in the light of the facts in this case, particularly the Department's finding that the patents had been duly delivered. The question of the acceptance of an allotment, where the patents had not been delivered, was not before the Department and the language quoted has no reference to such a case.

It is elementary that a decision must be construed as a whole and only with reference to the facts of the case decided therein. Connected expressions appearing therein must not be singled out as authority for deciding a case presenting an entirely different state of facts.

The motion for rehearing is denied.

BO SWEENEY,
Assistant Secretary.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, Appellant,	} No. 741.
v.	
BESSIE WILDCAT ET AL.	

CERTIFICATE FROM AND CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is a bill in equity brought by the United States in its own behalf and in behalf of the Creek tribe of Indians against the heirs of Barney Thlocco for the purpose of having declared void and canceled an allotment certificate and deeds issued in his name as a Creek Indian allottee for 160 acres of the Creek tribal domain.

The bill avers that Thlocco was a Creek Indian who died prior to April 1, 1899, and therefore not subject to be enrolled and allotted under the Creek Agreement, ratified March 1, 1901 (31 Stat. 861, 870), effective May 25, 1901 (32 Stat. 1971); that the Commission to the Five Civilized Tribes (known as

the Dawes Commission), with authority under the Creek Agreement to enroll for allotment and allot Creek Indians living on April 1, 1899, arbitrarily and without evidence or knowledge of the life or death of Thlocco on that date, but acting upon the arbitrary assumption that he was a living person, enrolled him for allotment on May 24, 1901, caused to be issued in his name a certificate of allotment on June 30, 1902, and allotment deeds for the land in question on March 11, 1903, which were approved by the Secretary of the Interior April 3, 1903; that said deeds, although recorded in the office of the Dawes Commission, were never delivered to anyone but remain in possession of the plaintiff's officers; and that on December 13, 1906, the Secretary of the Interior caused the name of Thlocco to be stricken from the Creek tribal rolls (R. 5-7).

The bill also avers inability of the plaintiff to set out any evidence taken before or had by the commission respecting the question whether Thlocco was living or dead on April 1, 1899, because no such evidence was taken before or had by it (R. 6).

The answer admits the averments of the bill as to the enrollment of Thlocco in 1901, the issuance in his name of a certificate of allotment and allotment deeds, and the approval and recordation of the deeds, and avers that Thlocco was a living person on April 1, 1899; that he died prior to June 30, 1902, the date of the selection of his allotment; that the action of the Secretary of the Interior in causing the name of Thlocco to be stricken from the

rolls was without notice to the heirs of Thlocco and was illegal and void; that the Dawes Commission was "vested with full and complete power, authority and jurisdiction" to make this enrollment and allotment "upon such hearing and evidence as the Commission deemed satisfactory;" that its work having been approved by the Secretary of the Interior "said enrollment, allotment and patent can not be cancelled, nor can the issue of fact upon which the Commission placed the name of said Barney Thlocco upon the approved Creek roll be tried again," and that the "court is without authority of law or jurisdiction to reopen or retry the question of fact sought to be put in issue." The defendants also pleaded the federal statute of limitation of six years (26 Stat., §8, p. 1099), and laches.

The interveners Bisett, Posey, and others claim under an allotment of 5 acres of the land made to Posey on May 19, 1913, and join with the Government in its attack on the allotment to Thlocco. (R. 13, 17.)

No right as a bona fide purchaser or encumbrancer is asserted on behalf of any defendant or intervenor.

On the trial the Government offered to prove by evidence clear and convincing that Barney Thlocco died before April 1, 1899 (R. 62-64, 111-112). Objection to this offer was sustained by the court on the ground that the question whether Thlocco was living on April 1, 1899, was concluded by the action of the Dawes Commission in placing his name upon the tribal roll for allotment and in making the allot-

ment in his name, unless it were first shown that such action had been induced by fraud, error of law, or gross mistake of fact (R. 41, 63, 65, 108-111). The court ruled that if the commission "acted without any evidence whatever, that judgment would amount to a gross mistake of fact and law" (R. 41). The Government then undertook to prove that the commission had so acted (R. 66-108).

The evidence on this point (discussed in detail, *infra*, pp. 24-28) showed: That Thlocco was enrolled on May 24, 1901, the last day before the ratification of the Creek Agreement, along with a large number of others appearing on the old tribal rolls and unaccounted for (R. 68, 73-74); that this was done in many cases without information as to whether the Indians were living or dead, or if dead when they died (R. 73, 85), in order to save every possible right, on account of a provision in section 28 of the Creek Agreement (31 Stat. 867) apparently forbidding enrollment of any person after its ratification (R. 67, 77, 85, 90, 98); that at this time no investigations were being made, as there was no time to investigate (R. 90, 92); that Thlocco's enrollment card was made out and completed on May 24, 1901 (R. 68, 90, 93, 99); that there was no subsequent investigation in the case of completed cards (R. 68, 86, 94, 95, 98); that these enrollments were made by clerks employed by the Dawes Commission upon such information as they could obtain, including oral statements not under oath and not reduced to writing (R. 69-70, 77, 86-87, 90, 95, 99); that the

commissioners accepted the judgment of the clerks on the enrollment cards (R. 100); that the clerk who enrolled Thlocco thought he must have had some information from some unremembered source regarding Thlocco's right to enrollment (R. 68, 69, 74); that this clerk "knew that Thlocco was dead" (R. 68), but nevertheless enrolled him as a living person at the time (R. 88, 90, 91, 93); and that he was subsequently allotted as a person living at the time of allotment (R. 79).

At the conclusion of this evidence, the Government again attempted to prove that Thlocco died before April 1, 1899 (R. 108). On objection by the defendants the court excluded the testimony on the ground that the Government had not "by clear and convincing proof shown to the court that the Commission acted in enrolling Thlocco without any evidence whatever" (R. 109). Thereupon the Government formally offered the testimony from personal knowledge of twenty-one witnesses that Thlocco died in January, 1899, which was rejected by the court upon the grounds before stated (R. 111-112).

It was proved without objection that, after the deeds to Thlocco were recorded in the office of the commission, on April 11, 1903, they were sent to the Principal Chief of the Creek Nation for delivery to the allottee, and that, a question having arisen as to whether Thlocco was entitled to an allotment, the deeds were recalled and placed in the files of the commission, where they have remained ever since (R. 49).

The Government then offered a record of proceedings before the commission instituted August 9, 1904, by the Creek Attorney, in which it was found upon sworn evidence, but without actual notice to the heirs of Thlocco, that Thlocco died before April 1, 1899, and upon which finding the Secretary of the Interior, on December 13, 1906, directed his name to be stricken from the tribal roll (Gov't Ex. 7, R. 51-61). Objection to this evidence was sustained upon the ground that so far as the action of the Secretary purported to affect the validity of the allotment to Thlocco it was taken without authority, and that so far as it related to the right to participate in the distribution of other tribal property, it had no place in this hearing (R. 40-42, 62).

The Government further offered to prove that no person claiming under Thlocco had taken possession of the land prior to cancellation of the enrollment by the Secretary or the institution of this suit (R. 50); that no instrument was filed for record in Creek County where the land is situated in any manner affecting the title until the year 1913 (R. 113), and that on February 17, 1911, the Government brought suit in the United States District Court against the unknown heirs of Thlocco and obtained a decree by default, after notice by publication, cancelling the allotment deeds, which case was reopened upon the application of parties claiming to be the heirs of Thlocco, and thereafter was dismissed by the Government on the same day the bill in this case was filed (R. 113-114). Objections to these offers were sus-

tained on the ground that the evidence was not material to the issues in this case. Exceptions to all adverse rulings were saved on behalf of the Government.

A decree was then entered dismissing the bill (R. 117) and the Government appealed to the Circuit Court of Appeals (R. 119). That court, after a hearing, certified to this court for decision the following questions (R. 200):

1. Should the evidence offered by the Government to show that Thlocco died prior to April 1st, 1899, have been admitted?

2. Should the evidence offered by the Government to show that Thlocco's enrollment was canceled by the Dawes Commission, have been admitted?

3. Were the certificate of enrollment and deeds to Thlocco null and void because he was dead at the time they were made?

Thereafter, upon application of counsel for defendants and interveners, to which the Solicitor General made no objection, the entire record and cause was ordered to be brought up for consideration.

The points arising under the various assignments of error (R. 120) which we desire to urge are presented by the first certified question. We maintain that the evidence offered to show the death of Thlocco prior to April 1, 1899, should have been admitted, for two reasons, namely:

1. The existence of Thlocco on April 1, 1899, was essential to the jurisdiction of the Dawes Commission over the subject.

2. The enrollment and allotment of Thlocco was made arbitrarily and without evidence as to whether he was living or dead on April 1, 1899.

ARGUMENT.

I.

The existence of Thlocco on April 1, 1899, was essential to the jurisdiction of the Dawes Commission over the subject.

The powers and duties of the Dawes Commission with respect to enrollment of Creek Indians for the purpose of allotment are prescribed by section 21 of the Curtis Act of June 28, 1898 (30 Stat. 495, 502), and section 28 of the Creek Agreement, ratified by Congress March 1, 1901 (31 Stat. 861, 869), effective on ratification by the Creek Council May 25, 1901 (32 Stat. 1971).

By section 21 of the Curtis Act the commission was "authorized and directed to make correct rolls of the citizens by blood" of the Creek Tribe, "eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made" (30 Stat. 502). The allotment rolls were required to be made "descriptive of the persons thereon" for after identification, and authority was granted to the commissioners "to take a census of said tribes or to adopt any other means by them deemed necessary to enable them to make such rolls,"

with the right to "have access to all rolls and records" of the tribe (p. 503), and with power "to administer oaths, examine witnesses and send for persons and papers" (p. 504).

Section 28 of the Creek Agreement directed that "all citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one" of the Curtis Act "shall be placed upon the rolls to be made by said Commission under said act of Congress," provided for allotments to the heirs of those who subsequently died, and concluded as follows (31 Stat. 870):

The rolls so made by said commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons.

The plan of allotment contemplated by the Curtis Act (§ 30, 30 Stat. 514) as well as that adopted by the Creek Agreement (§ 3, 31 Stat. 862) was one of equal distribution of the tribal property "as nearly as may be." According to this plan, the heirs of a member of the tribe who died before allotment would not inherit his distributive share. They were entitled to allotments in their own right and the addition of the right of their ancestor would give them an unfair share of the tribal lands. *La Roque v. United States*, 239 U. S. 62, 65; *Woodbury v. United States*, 170 Fed. 302, 305. The exception in the

Creek Agreement in favor of the heirs of Indians who died on or after April 1, 1899, was one of practical necessity. Under section 11 of the Curtis Act (30 Stat. 497) upwards of 10,000 tentative allotments had been selected by enrolled Creek citizens, beginning April 1, 1899. The Curtis Act had not been accepted by the Creek tribe but, in order to avoid the confusion and hardship which would have resulted from an attempt to vacate so great a number of selections already made, they were treated in the Creek Agreement (§ 6, 31 Stat. 863) the same as if made after its ratification. *Woodward v. de Graffenried*, 238 U. S. 284, 308-314. On this account, the provision in section 28 of the Creek Agreement for enrollment of all members who were living on April 1, 1899, was requisite as a matter of course in order to preserve equality of distribution.

It is therefore entirely clear that if Barney Thlocco died prior to April 1, 1899, his heirs were not entitled to an allotment in his name and his enrollment for such allotment was unauthorized.

The District Court held that the fact of Thlocco's existence on April 1, 1899, was concluded by the final judgment of the Dawes Commission (evidenced by the enrollment record, certificate of allotment, and allotment deeds), in the absence of clear and convincing proof that the enrollment was "based upon fraudulent testimony," or that Thlocco's existence on April 1, 1899, was "arbitrarily found without any testimony" (R. 110).

It is doubtless true that the Dawes Commission, acting under supervision of the Secretary of the Interior, was a special administrative tribunal vested with jurisdiction to enroll for allotment all Creek citizens who were living on April 1, 1899. But jurisdiction always presupposes the existence of a subject upon which the tribunal is competent to act. If Thlocco died prior to April 1, 1899, he was not then a Creek citizen. He was in truth a nonentity. He had no existence, either in fact or for the purpose of allotment to his heirs. *Iowa Land & Trust Co. v. United States*, 217 Fed. 11, 13.

It is a rule as old as the law that no judgment is ever conclusive as to the existence of a fact essential to the jurisdiction. In *Rose v. Himely*, 4 Cranch, 241, 269, Chief Justice Marshall said:

The operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases, that jurisdiction, unquestionably, depends as well on the state of the thing, as on the constitution of the court. If, by any means whatever, a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property.

This rule extends to the case of a judgment which recites the jurisdictional facts as having been found by the court upon evidence. The judgment record

may be contradicted as to such facts. This was decided in *Thompson v. Whitman*, 18 Wall. 457, 468, where the court by Mr. Justice Bradley said:

It is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry.

In that case the sheriff of a county in New Jersey was sued in a Circuit Court of the United States for taking and carrying away a vessel of the plaintiff. The defendant justified his action by the judgment of a New Jersey court which had ordered the vessel to be sold for violating a statute of New Jersey in reference to raking and gathering clams. It was held that the plaintiff was entitled to defeat the judgment by showing, as a matter of fact, that the vessel was not seized within the county to which the jurisdiction of the court was limited, although the judgment recited that it was.

A money judgment without personal service on the defendant within the jurisdiction is void, and lack of such service may be shown in contradiction of a recital of this jurisdictional fact, without other evidence. *Harris v. Hardeman*, 14 How. 333, 339-344; *Knowles v. Gaslight and Coke Co.*, 19 Wall. 58, 61; *Hall v. Lanning*, 91 U. S. 160, 165. Similarly, a judgment

by confession of an attorney in fact may be impeached simply by showing that the attorney acted without authority. *National Exchange Bank v. Wiley*, 195 U. S. 257, 269-270.

In divorce proceedings jurisdiction of the court is usually made to depend upon the fact that the plaintiff has been domiciled in the state for a certain length of time. A decree in such a case, when relied upon in another court, may be shown to be void for lack of jurisdiction by proof that the plaintiff in the divorce proceedings did not in fact maintain the required domicile, although the decree recites that he did. *Bell v. Bell*, 181 U. S. 175, 178; *Streitwolf v. Streitwolf*, 181 U. S. 179, 182-183. And this is true although both parties to the divorce proceeding were personally before the court. *Andrews v. Andrews*, 188 U. S. 14, 39-41.

A striking exemplification of this rule is the case of a grant of letters of administration on the estate of a living person by a court having jurisdiction only to administer estates of deceased persons. In such a case the court is presumed to have decided upon inquiry that the person whose estate is administered was dead. Yet proof that the person so adjudged to be dead was in fact alive is admissible and sufficient to impeach the judgment in a collateral proceeding. Such a judgment is wholly void if this fact, essential to the jurisdiction of the court, did not exist. *Scott v. McNeal*, 154 U. S. 34, 39-48, in which Mr. Justice Gray collected and reviewed a multitude of cases to the same effect.

Whether the court, in finding a fact upon which its own jurisdiction depends, acts upon evidence or without evidence is wholly immaterial, when it is shown that the fact did not exist. It was so regarded in *Scott v. McNeal*, 154 U. S. 34, where jurisdiction of the probate court was predicated upon evidence of death. At page 43, the court disapproved a decision of the Court of Appeals of New York holding letters of administration granted by the surrogate upon a live man's estate to be void, "because evidence was produced that the surrogate never in fact considered the question of death, or had any evidence thereof—thus making the validity of the letters of administration to depend not upon the question whether the man was dead, but upon the question whether the surrogate thought so." This and another New York case were the only decisions found in *Scott v. McNeal* to be out of harmony with the true rule, except the one before the court, which was reversed.

The following language of Chief Justice Marshall in *Griffith v. Frazier*, 8 Cranch, 9, 23, is illuminating on this point:

In the common case of intestacy it is clear that letters of administration must be granted to some person by the ordinary; and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority; because he had power to grant letters of administration in the case. But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void.

Yet, the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others, be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case, in truth, was not one within his jurisdiction; it was not one in which he had a right to deliberate; it was not committed to him by the law.

The same rule is applied to proceedings in the Land Department which culminate in the issuance of a patent. Questions of fact within the jurisdiction of that department are considered as settled by its rulings preliminary to patent. But questions of fact upon which its jurisdiction depends are never so regarded. In *Doolan v. Carr*, 125 U. S. 618, 625, upon a careful examination of the prior decisions, the court by Mr. Justice Miller said:

The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction, established by law, and it has been often asserted in this court, that even a patent from the government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue.

Want of authority may have reference either to the land described in the patent or to the grantee named therein. If the land was not subject to be patented (*Burfenning v. Chicago, St. Paul &c., Ry.* 163 U. S. 321, 323, and cases cited), or if the grantee had no existence (*Moffat v. United States*, 112 U. S. 24, 31; *Sampeyreac v. United States*, 7 Pet. 222, 241; *Hall v. Russell*, 101 U. S. 503, 509), the patent is a nullity and conveys no title. Whether such a patent was induced by fraud or mistake, or resulted from a lack of evidence, is not controlling. The inquiry is as to the existence of facts essential to the jurisdiction. "In such cases, the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act." *Smelting Co. v. Kemp*, 104 U. S. 636, 641.

A land patent, like a judgment, is void if there be want of jurisdiction over the subject, and this may be shown in any collateral proceeding. *Noble v. Union River Logging Railroad*, 147 U. S. 165, 174, and cases cited. Yet in the case of a patent, where the defect does not appear on the face of the instrument or from the law upon which it is founded, but rests upon proof of extrinsic facts, administrative officers are not competent to find such facts and determine the nullity. That is a judicial act, and requires the judgment of a court. For this reason the Government, to obtain a cancellation of the patent, must resort to a suit in equity. In such a suit, however, all that need be alleged and proved as ground for relief is the fact which shows

the want of authority to issue the patent. Fraud, if it exist, is an additional or incidental ground, but it is not essential. *United States v. Stone*, 2 Wall. 525, 535-536; *Mullan v. United States*, 118 U. S. 271, 278-279; *Moran v. Horsky*, 178 U. S. 205, 211-212.

In *Moffat v. United States*, 112 U. S. 24, 31, the Government obtained a decree cancelling certain preemption patents which had been issued to fictitious persons. The suit was resisted by purchasers claiming title through mesne conveyances without notice. But the patents were held to be nullities conveying no title under which subsequent purchasers could claim protection. In that case there was fraud on the part of the register and receiver, who concocted documents and made false records upon which the patents were issued. But it is evident that fraud was not the sole basis of the suit. If the grantees had actually existed and the patents had been issued on false proofs of their qualifications or compliance with the preemption law, the patents would have been voidable and subject to cancellation for that reason, but they would not have been utterly void so as to cut off the rights of subsequent purchasers without notice of the fraud. They were void and that result followed, not because of fraud, but because the grantees had no existence. *Colorado Coal Co. v. United States*, 123 U. S. 307, 313.

In *La Roque v. United States*, 239 U. S. 62, it was held that the act of January 14, 1889 (25 Stat. 642), under which the Chippewa Indians in Minnesota were

allotted, authorized allotments only to living Indians, and that therefore an allotment trust patent issued in the name of one who died before allotment was void and conveyed nothing to his heirs. In that case it was conceded that the Indian died before allotment. So in this case it stands admitted, upon the Government's offer of proof, that Thlocco died before April 1, 1899. Whether the Department of the Interior acted upon evidence of the Indian's existence before allotment in the *La Roque* case was not considered. Presumably it did. But it is hardly conceivable that the allotment would have been any the less void for want of authority to make it by the fact that it was made upon evidence. The question was as to the fact of death before allotment. That fact being conceded, the nullity of the allotment resulted as one made without authority of law.

The case of *Iowa Land & Trust Co. v. United States*, 217 Fed. 11, known as the *Hawkins* case, decided by the Circuit Court of Appeals for the Eighth Circuit on July 29, 1914, is in all substantial respects like the case at bar. In that case the United States sued in behalf of the Creek tribe to have declared void and canceled an allotment certificate and deeds issued in the name of Chester Hawkins as a member of the tribe. It was shown that Hawkins died May 27, 1898, and that he had been enrolled upon evidence filed with the Dawes Commission which tended to show that he was living on April 1, 1899. It was held that the allotment deeds were utterly void even

as against the plea of a bona fide purchaser without notice. The court, speaking through Judge Carland, said (p. 13):

Chester Hawkins, having died before April 1, 1899, must be considered as having had no existence, so far as being a citizen of the Creek Nation entitled to an allotment of land under any law of Congress. The patents issued by the Creek Nation ran to a person not in being, and therefore conveyed no title whatever. There being no ancestor entitled to an allotment of land, there was no land to which the heirs of Chester Hawkins were entitled.

The report of that case shows that the enrollment of Hawkins was induced by false evidence filed with the commission. But this was merely incidental. It was not the sole basis of the right to show the nonexistence of Hawkins on April 1, 1899. The suit was not founded simply on fraud or false testimony. If it had been, the allotment deeds would have been voidable merely, not void, and the plea of innocent purchaser would have prevailed. If it had been shown that Hawkins lived on April 1, 1899, and that his allotment had been induced by false testimony concerning his qualifications to receive an allotment, the allotment deeds would still have been voidable, but the bona fide purchaser without notice would have received protection.

If the ruling of the District Court in the case at bar had been applied in the *Hawkins case*, the Government would certainly have failed, because in that

case the commission unquestionably acted upon evidence. It does not suffice to say that, under the ruling in the case at bar, it was open to the Government to allege and prove the falsity of the evidence, if any, upon which the commission acted as a ground for attacking its determination that Thlocco was alive, because it is obvious that the only proof of such falsity that could be adduced was proof that he was dead. A rule that evidence must first be shown to be false before the only existing evidence of its falsity can be admitted would be a plain denial of all relief against wrong perpetrated by false evidence.

This is not a case like *Noble v. Union River Logging Railroad*, 147 U. S. 165, 166, 176, where the question was whether a certain railroad company was legally qualified to obtain the benefits of the general right-of-way act of March 3, 1875 (18 Stat. 482), and the suit was to enjoin the execution of an order revoking a final approval of the company's map of definite location. The act having vested in the Secretary of the Interior authority to perfect right-of-way grants by approval of location maps of railroad companies, it was held that the company's qualification to receive the grant was not a jurisdictional fact but one which the Secretary had authority to determine, and that such determination, having passed the title, could not be revoked by a subsequent departmental order. If the grantee company in that case had not in fact had any existence, and if that case had been a direct proceeding on behalf of the Government to set aside

the Secretary's approval on that ground, a very different question would have been presented.

II.

The enrollment and allotment of Thlocco were made arbitrarily and without evidence as to whether he was living or dead on April 1, 1899.

From the allotment certificate and deeds there arises a presumption that the commission acted upon substantial evidence of Thlocco's right to allotment. The question is whether that presumption has been rebutted.

What precedent determination of Thlocco's right to allotment do the allotment certificate and deeds imply? Clearly that he was a Creek Indian living at the time of their issuance, but not that he lived on April 1, 1899, and died before allotment.

Sections 7 and 28 of the Creek Agreement (31 Stat. 861, 863, 870) required allotments to be made to living Indians in two tracts, homestead and surplus, and, in case of death before allotment, in one tract to the heirs. *Mullen v. United States*, 224 U. S. 448, 455-456. The witness, Hopkins, who acted as chief clerk and attorney for the commission at the time of this transaction, testified (R. 79):

There was a form of certificate of allotment prepared for use in the Creek Nation in cases of allotment made to the heirs of deceased citizens; there were three forms of patents prepared, one for the allotment of the homestead, another for the allotment of the surplus, and one for allotments to the heirs of deceased

citizens. It was the practice of the Commission, in cases where the enrolled citizen was dead, to allot the lands to his heirs.

The Annual Report of the Dawes Commission for 1902, at page 40, states:

It was necessary that the 40 acres designated as a homestead be deducted from the allotment of 160 acres; so that separate deeds might be issued for the same. . . .

Three forms of conveyances have been prepared, viz.: Allotment deeds, homestead deeds, and deeds to the heirs of deceased persons. . . .

Accompanying this report and marked exhibits 8, 9, and 10 will be found specimen forms of these deeds.

The first two of these forms, appearing on page 162, are for separate deeds to living Indians for the homestead and surplus, and the third, on page 163, is for a single deed to the heirs of a deceased Indian for the entire allotment.

The certificate in this case runs to Thlocco in person and designates the homestead and surplus lands separately (R. 44½), and the deeds, also running in his name, purport to convey the tracts so designated separately (R. 47, 48), both on the forms provided for living persons.

The uniformity of the practice of the commission in issuing deeds to the heirs of deceased allottees instead of to the allottees in person is shown by the following statement in its report for 1906, at page 648:

Prior to the act of April 26, 1906, it was necessary that deeds covering the lands of

deceased allottees be issued to the heirs of the deceased, and in cases where deeds had been issued before evidence of death was received it was necessary to recall them and issue new deeds to their heirs. For this reason 220 deeds were canceled during the past year and new deeds to the heirs of deceased allottees issued in their stead.

The question then is: Was there any justification for the presumptive finding that Thlocco was living on the date of the allotment certificate (R. 44½), June 30, 1902, and on the date of approval of the deeds (R. 47, 48), April 3, 1903? Upon this the record is conclusive, for in the answer of the defendants it is alleged "that said Barney Thlocco had died prior to the selection and allotment of said land, which was made on the 30th day of June, 1902" (R. 31, par. viii).

The presumption arising from the instruments under which the defendants claim is that Thlocco was found to be living when those instruments were issued. That presumption is completely rebutted by the defendants themselves. It can not be said that, notwithstanding Thlocco's death before allotment, he was presumably found to be living on April 1, 1899, for in that case the allotment would have been made to his heirs and not to him in person. This alone is sufficient to establish the fact that Thlocco was allotted without evidence of his right to allotment.

But assuming, without admitting, that this is inconclusive, we inquire as to what, if any, substan-

tial evidence the commission had of Thlocco's existence before the time he was admittedly dead.

The presumption arising from the enrollment, as in the case of the allotment certificate and deeds, is that Thlocco was living at that time, but not that he was living April 1, 1899, and had since died. It was the established practice and rule of the commission not to enroll any dead person except upon affidavit, for a permanent record, that he was living on April 1, 1899, in which case a notation would be made on the "census card" (as the enrollment record was called), giving the date of death or referring to such affidavit (R. 75, 85, 88, 89, 91, 93). No such affidavit was obtained or notation made in the case of Thlocco, and his completed card (R. 38 $\frac{1}{2}$) therefore shows that he was treated as alive on the day of its date, May 24, 1901, and that no investigation was made or information received and acted on as to the date of his death (R. 88, 90-91, 93, 99). However, the clerk, Merrick, who enrolled Thlocco on May 24, 1901 (R. 68), and upon whose information the enrollment was passed by Commissioner Bixby (R. 70, 95, 100), testified that, at the time of this enrollment, "we knew that Thlocco was dead" (R. 68). If this be true, then the enrollment record must necessarily be false, unless it be presumed that in this particular instance the rule and practice of the commission with respect to making the record in such cases was arbitrarily disregarded.

Assuming that the commission thus arbitrarily disregarded its established practice in this instance,

we finally inquire as to whether there was before the commission any substantial evidence of Thlocco's existence on April 1, 1899.

The name of Thlocco appears on the 1895 tribal roll (R. 80½), and also on an "old census card" (R. 72½) made by the clerk, Hopkins, in 1897 (R. 76), indicating that he lived on those dates. The ordinary presumption that a person continues to live for seven years in the absence of contrary evidence might have afforded some ground for holding that Thlocco lived beyond April 1, 1899 (R. 75; *Folk v. United States*, 233 Fed. 177, 189; *Scott v. McNeal*, 154 U. S. 34, 49-50). But the commission did not act on this presumption. Merrick, who wrote the enrollment card, and Commissioner Bixby, who passed it for approval, both testified that they must have had some information outside the records that Thlocco was living on April 1, 1899, else he would not have been enrolled (R. 69, 70, 74, 75, 95, 99).

At the time of the transaction in question the enrollment work was extremely pressing. The name of Thlocco was enrolled on May 24, 1901, the last day before the ratification of the Creek Agreement, along with a large number of others appearing on the old tribal rolls and unaccounted for (R. 68, 73-74). This was done in most cases without information as to whether the Indians were living or dead, or, if dead, when they died (R. 73, 85), in order to save every possible right on account of a provision in section 28 of the Creek Agreement (31 Stat., 867), which apparently forbade enrollment of any person after its rati-

fication (R. 67, 77, 85, 90, 98). At this time no investigations were being made; there was no time to investigate (R. 90, 92). During the last two or three days before May 25, 1901, the clerks were working under great pressure, enrolling 200 to 300 names a day (R. 66) and working far into the night (R. 73). Thlocco's enrollment card was made out and completed on May 24, 1901 (R. 68, 99). There was no subsequent investigation in the case of completed cards (R. 68, 86, 94, 95, 98). These enrollments were made by clerks employed by the Dawes Commission upon such information as they could obtain, including oral statements not under oath and not reduced to writing (R. 69-70, 77, 86-87, 90, 95, 99), with the result that they "were often imposed upon" (R. 68, 74). The commissioners accepted the judgment of the clerks on the enrollment cards (R. 100), and this was done in the case of Thlocco by Commissioner Bixby (R. 70, 99, 100). As to the nature or source of the information upon which Thlocco was enrolled no one concerned in the transaction had any recollection (R. 69, 75, 98). No records other than the enrollment cards were made except in contested cases (R. 87, 88, 91, 99). Nothing else was sent to the Secretary of the Interior (R. 67, 95-97), and his approval was therefore perfunctory (R. 196).

At the time of Thlocco's enrollment there was a pencil notation opposite his name on the 1895 tribal roll, "Died in 1900" (R. 80½), which the clerk, Merri-
rick, thought might possibly have been considered

sufficient evidence (R. 75). This notation was made by Hopkins, another clerk, who testified that he didn't know when or from whom he got the information, except that it was some time prior to the enrollment (R. 82-83), that it was not sufficient upon which to base an opinion (R. 83), but was intended to indicate "that an inquiry should be made as to when Thlocco died or whether he was dead and get the proper affidavit" in accordance with the established practice, and that this information "was given by somebody who was not in a position to make an affidavit of death" (R. 78, 83). The notation made by Hopkins was, as another clerk testified, no more than "an invitation to investigate" (R. 93).

A circumstance which the District Court regarded as "a very significant feature" and which was given controlling force against the Government (R. 109) was one showing that the clerk, Merrick, who enrolled Thlocco, had some information from somebody about Thlocco outside of the records. Besides the old tribal roll he had the "old census cards" which gave the necessary descriptive matter for the enrollment cards. He had the old census card of Thlocco, made in 1897, which he was certain that he had used. On comparing the two cards (R. 38½, 72½), he testified: "I will have to say that in view of the fact that the age on the old census card is given as 40 and that on the new as 35, and the post office is different, that I must have had some information other than the old census card" (R. 69). Hopkins also had some information when he made the old census card in 1897, acquired,

not under extraordinary pressure, but in the course of an investigation in the field (R. 76). He also noted a daughter of Thlocco, 15 years of age in 1897 (R. 72½), and therefore 19 in 1901 when Merrick enrolled the father as 35, a variance naturally calling for investigation. At best the circumstance to which the court gave controlling effect exhibits no more than a conflict of indefinite "information" received by two of the clerks, while demonstrating the unreliability of that upon which Merrick was acting and by means of which, as he testified, "we were often imposed upon" (R. 68, 74).

Summarizing the facts, it appears that the allotment was made to Thlocco as a living person, when he was admittedly dead; that he was enrolled as a living person, though he was known to be dead; that the enrollment was made by a clerk of the commission, without any investigation of the time of Thlocco's death, though he was warned to investigate; that this clerk's record of the enrollment was accepted by one commissioner without further investigation or additional evidence; that the enrollment so made was reported to the Secretary of the Interior for approval without any additional record; that the Secretary's approval thereof was perfunctory; that the only evidence before the enrollment clerk of Thlocco's existence on April 1, 1899, was a pencil notation on the tribal roll "Died in 1900," which notation had been made previously by another clerk upon hearsay information and merely as a warning to investigate; and that the clerk who enrolled

Thlocco might have had some indefinite information from some unascertainable source about Thlocco outside the records, which information, if any, was obtained at a time of great pressure and contradicted the record description of Thlocco in such wise as to have no other legitimate effect than to call for an investigation.

If it could be said upon these facts that the Dawes Commission enrolled and allotted Thlocco upon substantial evidence of his right thereto, it would be difficult to imagine a case in which a lack of evidence could be shown. And if the Government's ability to show a more certain lack of evidence as to existence of an allottee on April 1, 1899, conditions its right to prove his nonexistence on that date, it must result that no allotment wrongfully made without evidence to one who had no existence on the inhibitive date could ever be canceled.

STATUTE OF LIMITATION AND LACHES.

The statute of limitation invoked by the defendants (act of March 3, 1891, §8, 26 Stat. 1099) refers only to suits to cancel patents issued for public lands of the United States and therefore has no application to a suit of this kind to cancel Indian allotment deeds. *La Roque v. United States*, 239 U. S. 62, 68.

The charge of laches is equally without merit. The allotment deeds were approved April 3, 1903, and recorded in the office of the commission April 11, 1903 (R. 47, 48). They were then sent to the Principal Chief for delivery and afterwards recalled when

Thlocco's right to allotment was questioned (R. 49). On August 9, 1904, the Creek attorney instituted proceedings before the commission to strike Thlocco's name from the roll because of his death before April 1, 1899, whereupon, on August 25, 1904, Commissioner Bixby "recommended that the case be reopened and that a rehearing be ordered" (R. 52). On September 7, 1904, the Commissioner of Indian Affairs concurred in this recommendation (R. 53). On September 16, 1904, the Secretary of the Interior ordered a rehearing (R. 55). During the year 1905 an investigation was conducted in which witnesses testified under oath that Thlocco died in January or February, 1899, of smallpox (R. 56-58). On February 9, 1906, Commissioner Beall issued to the heirs of Thlocco notice of a hearing for February 19, 1906 (R. 58), and an attempt was made to locate these heirs but was not successful (R. 60). On October 10, 1906, Commissioner Bixby reported to the Secretary of the Interior that the testimony submitted "conclusively establishes the date of the death of Barney Thlocco as prior to April 1, 1899," and recommended that his name be stricken from the approved roll (R. 59-60). On December 13, 1906, the Secretary directed Thlocco's name to be stricken from the roll, and requested the Attorney General to take action to set aside the allotment deeds (R. 61). On February 17, 1911, suit was instituted by the Government against the unknown heirs of Thlocco and, after service by publication and default, a decree was

rendered July 29, 1911, canceling the allotment deeds (R. 48, 113). On July 13, 1913, the cause was reopened on application of persons claiming to be the heirs of Thlocco, and thereafter dismissed on motion of the Government November 1, 1913, the day the present bill was filed (R. 113). The land was unoccupied and unclaimed by any person until 1913 (R. 50, 113).

There has been no delay to the injury of any person. No claim is asserted as a subsequent purchaser or incumbrancer on the faith of the allotment deeds. No testimony has been lost by lapse of time. Every person concerned in the transaction was present and testified at the hearing.

CONCLUSION.

The decree of the District Court should be reversed.

Respectfully submitted.

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APRIL, 1917.





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Supreme Court of the United States

October Term, 1974

THE UNITED STATES OF AMERICA, Appellant,

VERSUS

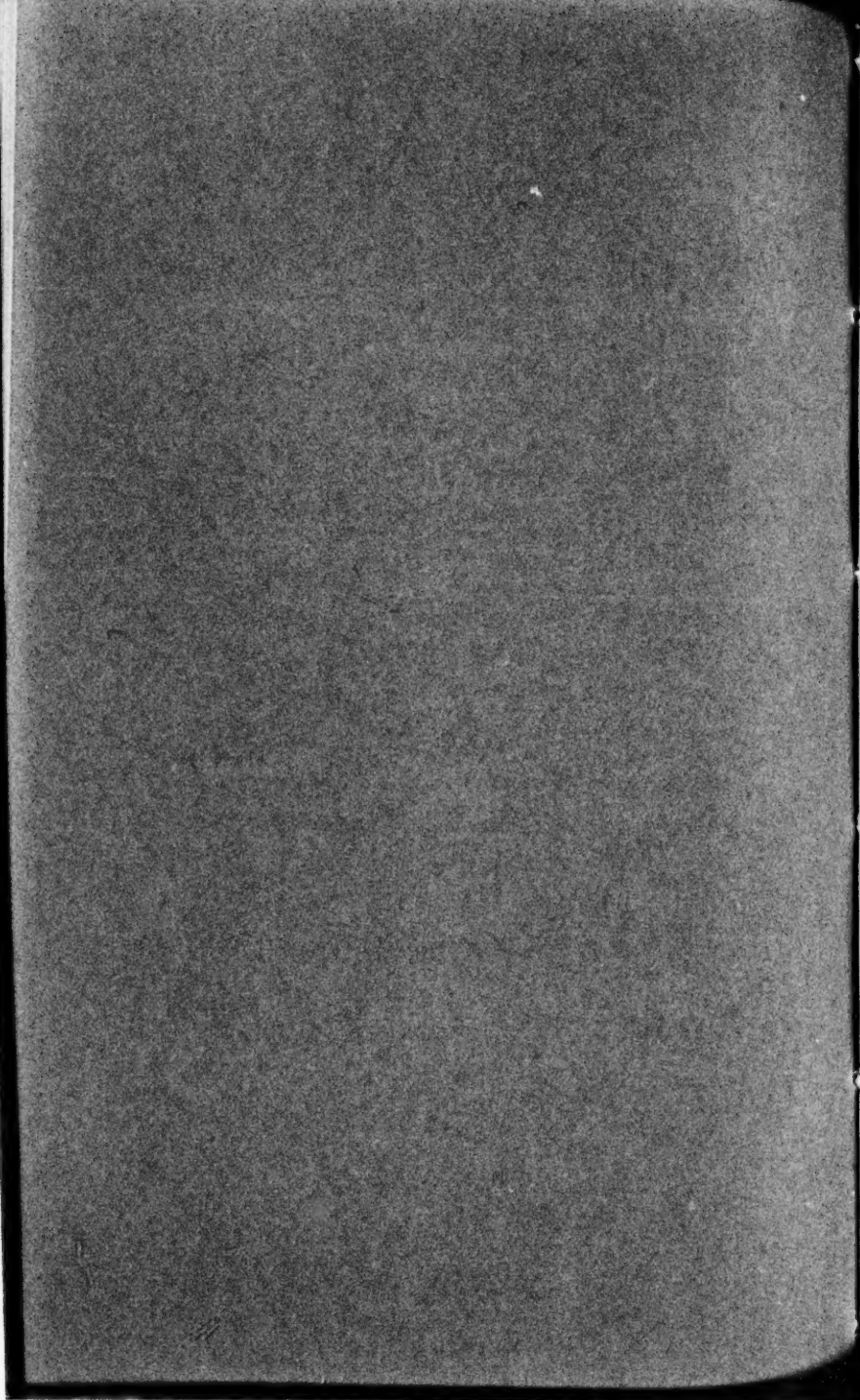
RESNAE WILSON, Respondent.

ON A PETITION FOR WRIT HABEAS CORPUS
FILED IN NO. 74-1011, U.S. SUPREME COURT

BRIEF IN SUPPORT OF CHARLES F. BENNETT,
TOMAWAY ONE COMPANY, F. L. MOORE
AND J. E. GIBSON IN SUPPORT OF THE
GOVERNMENT'S APPEAL

CHARLES F. BENNETT
JAMES A. MOORE

For Appellants: Charles F. Bennett,
Thomas A. Moore, F. L. Moore and
J. E. Gibson.



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In the
SUPREME COURT OF THE UNITED STATES.
October Term, 1916.

No. 741.

THE UNITED STATES, - - - - - Appellant,

vs.

BESSIE WILDCAT, a Minor, et al., - - Appellees.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

**BRIEF OF APPELLEES, CHARLES F. BISSETT,
TOXAWAY OIL COMPANY, F. L. MOORE
AND J. S. COSDEN, IN SUPPORT OF THE
GOVERNMENT'S APPEAL.**

This brief is filed by the appellees, Charles F. Bissett, Toxaway Oil Company, F. L. Moore and J. S. Cosden, solely in support of the appeal from the decree of the trial court dismissing the appellant's bill. The connection of these appellees with, and their interest in, the case, will appear from the following statement of facts:

Statement of the Case.

This suit is one instituted by the United States on behalf of the Creek Nation of Indians, to cancel an allotment of certain lands of the Creek Nation to one Barney Thlocco, as made by the Commission to the Five Civilized Tribes, without authority of law, because Barney Thlocco was not alive on April 1, 1899, and his enrollment was therefore in violation of the Act of Congress approved March, 1, 1901, and ratified by the Creek Nation May 25, 1901, which provides for the enrollment of those Creek citizens living on April 1, 1899.

The facts and circumstances upon which the suit is predicated, briefly stated, are as follows: One Barney Thlocco was, in his lifetime, a Creek Indian by blood whose name appeared on the Creek Tribal Rolls. In 1897 or 1898, the Dawes Commission under authority of the Acts of Congress relative thereto, made a list or census of all living Indians who would be entitled to be placed on the roll then in contemplation, as a basis for the division of the tribal land. This list or census was made up on cards upon which the names of such citizens were placed, and which cards were subsequently known as the "Old Census Cards." Under the Act of June 28, 1898, known as the Curtis Act, the work of enrollment in

the Creek Nation was proceeded with, until the passage by Congress of the Act of Congress approved March 1, 1901, known as the Original Creek Agreement. This act provided that it should be of full force and effect when ratified by the Creek National Council, and which ratification was required to be made within ninety days of the passage of the act by Congress. By the month of May, 1901, the majority of the Creeks had been enrolled, but there remained a large number, whose names appeared on the old census cards, who had not made application for enrollment and who were not accounted for. In view of that fact, the Creeks were reluctant to ratify the Act of Congress referred to, as it contained a provision that no person should be added to the rolls of citizenship of the tribe after the date of the agreement, and that no person whomsoever should be added to said rolls after the ratification of the agreement. This provision was construed by the Creeks as meaning the rolls prepared by the Dawes Commission, and officers of the Creek Nation were demanding to know what would become of those persons who had not yet appeared to be enrolled. Evidently, they were of the opinion that if the agreement was ratified, such persons would be excluded from any right to be on the approved roll. Because of these objections, an enrolling party was made up by the Dawes Commission which proceeded to Okmulgee, the capital of

the Creek Nation, and with the aid of the United States Marshal, this enrolling party succeeded in bringing in a large number of persons who had not made application to be enrolled. Up to May 25, 1901, in spite of these efforts, there were still quite a number of such persons remaining unaccounted for, and among them was Barney Thlocco. In the meantime, the Creek National Council was delaying the ratification of the agreement. Between May 20th and May 25th, the names of all such persons whose names appeared on the Tribal Rolls or upon the old census cards, and who had not been accounted for, were listed on new cards, that is to say, they were tentatively enrolled, but subject to further investigation, in order to satisfy the objection of the Creeks. Several hundred such persons were so listed on the three days prior to May 25th, on which date the agreement was ratified by the Creek National Council, being eighty-five days after the passage of the Act by Congress.

In pursuance of their purpose in making the tentative enrollments referred to, the Commission entered upon an investigation of the status of the persons so listed. In the case of Barney Thlocco, after a hearing in the matter at the instigation of the Creek Nation, and in pursuance of directions from the Secretary of the Interior, the Commission

found and determined that Barney Thlocco died prior to April 1, 1899. The investigation which led to such result was begun on April 9, 1904, and was concluded October 10, 1906, when the result of its investigation was transmitted to the Interior Department at Washington. Prior to this date, the name of Barney Thlocco had been placed on the approved roll, and the Commission therefore asked the Secretary of the Interior for authority to strike his name from such roll. The authority was granted, and on December 13, 1906, the Secretary of the Interior cancelled the enrollment of Barney Thlocco and struck his name from the roll in his possession, and on the same day authorized the Commission to take similar action as to the roll in its custody, which was done.

Prior to the proceedings detailed above, the Commission had arbitrarily, and without application of any one therefor, selected an allotment for Barney Thlocco which is the land involved in this suit. The land was selected in the name of Barney Thlocco, and on March 11, 1903, allotment patents were issued for the land in his name, all of which was done apparently upon the theory that he was then living. These patents were never delivered, and are still in the possession of the government, marked "cancelled." The cancellation of the patents was in pursuance of a decree of the United States Court for

the Eastern District, entered on July 29, 1911, in equity case No. 1543, *United States v. Unknown Heirs of Barney Thlocco*. This decree, however, was afterwards set aside, and the case re-opened, and on November 1, 1913, the date upon which this suit was instituted, the plaintiff dismissed the case.

Upon this state of facts, the Government brought this suit to cancel the allotment so made. The bill, after alleging its duty and obligation to the Creek Tribe of Indians, alleges substantially, that Barney Thlocco died in the beginning of the year 1899, prior to April 1, 1899, and that he was therefore not entitled to be enrolled as a citizen of the Creek Nation, or to receive in allotment any part of its lands; that the Commission to the Five Civilized Tribes caused the name of Barney Thlocco to be placed on the rolls of Creek citizens, then being prepared under the acts of Congress; that no hearing was held or investigation made by said Commission, and no evidence was produced or obtained with respect to the right of Barney Thlocco to be enrolled, and that no notice was given to the Creek Nation or its officers, that Barney Thlocco was about to be, or would be enrolled, and that there was no controversy, contest or adverse proceedings of any kind, by, or before, the said Commission, with respect to the enrollment of Barney Thlocco or his right to be so enrolled; that in plac-

ing the name of Barney Thlocco on the roll, the Commission acted arbitrarily and without knowledge, information or belief that he was living or dead on April 1, 1899, but acted on the arbitrary and erroneous assumption that he was living on the said date; that the Commission in thus enrolling Barney Thlocco, made a gross mistake of fact and of law, but that the plaintiff is unable to set up the evidence taken by the Commission respecting the question whether Barney Thlocco was living or dead on April 1, 1899, because no evidence was taken or had by such Commission. The bill further alleges that after the erroneous enrollment of Barney Thlocco, the Commission purported to allot in the name of Barney Thlocco, the land described in the bill, and on June 30, 1902, issued a certificate of allotment in the name of the said Barney Thlocco, as if he were a living person; that on April 3, 1903, the Commission caused to be executed homestead and allotment patents in the name of Barney Thlocco, neither of which patents have been delivered, but are in possession of the complainant, through its officers and agents. The bill alleges that no knowledge or information as to the mistake by the Commission in causing the enrollment of Barney Thlocco was had by the plaintiff until after the execution of said patents, nor was it known to the plaintiff until after that date that Barney Thlocco had died prior to April 1, 1899. It is

also alleged in the bill that on December 13, 1906, the Secretary of the Interior, by his executive order, caused the name of Barney Thlocco to be stricken from the roll of citizens of the Creek Nation, and that the said Barney Thlocco is not an enrolled citizen by blood, and has never been entitled to an allotment of land in the Creek Nation.

The bill prays for a cancellation of said patents as a cloud upon the title of the Creek Nation to said lands, and that the defendants be decreed to have no right, title or interest therein.

A large number of persons were permitted to intervene and be made parties to the suit, setting up their alleged rights to the property in controversy.

To the plaintiff's bill, all the defendants and intervenors, except Charles F. Bissett, Toxaway Oil Company, F. L. Moore and J. S. Cosden, filed a joint answer, by which they allege that the bill of complaint does not state facts sufficient to constitute a cause of action or entitled the plaintiff to the relief prayed for; they deny that Barney Thlocco died prior to April 1, 1899, and that he was not entitled to be enrolled as a citizen of the Creek Nation, or to receive an allotment of its lands; that the Commission did not make a mistake in the enrollment of

Barney Thlocco and did not act without evidence or arbitrarily, but that said Commission acted in accordance with the law and upon the evidence which was before it at the time, and which evidence said Commission found to be satisfactory and sufficient in law and in fact to authorize the placing of the name of Barney Thlocco on the rolls. They admit that the Commission allotted the lands in the name of Barney Thlocco and issued a certificate of allotment in his name, after his death, but deny that the allotment certificate was issued upon the arbitrary assumption that Barney Thlocco was a living person on April 1, 1899, and allege as a matter of fact that he was a living person on said date, and entitled to be placed on said rolls and to an allotment.

Charles F. Bissett, Toxaway Oil Company, F. L. Moore and J. S. Cosden, by leave of court, filed an intervening petition and cross-petition, in which they set up that on May 19, 1913, and after the decree of the United States Court cancelling the allotment, the Commission to the Five Civilized Tribes issued an allotment certificate to one Johnathan R. Posey, covering the West Half of the Southwest Quarter of the Northwest Quarter of Section Nine (9), Township Eighteen (18) North, Range Seven (7) East, which is a portion of the land allotted to Barney Thlocco. That this allotment certificate was

duly filed and recorded in the office of the Commissioner of the Five Civilized Tribes and in the office of the Register of Deeds for Creek County; that on the 19th day of May, 1913, said Johnathan R. Posey, after his selection of the land, executed and delivered an oil and gas mining lease of the lands above described, and of which said lease the intervenors were the owners; that the alleged heirs of Barney Thlocco have no interest in said land or in the oil and gas mining lease thereon and that the allotment of Barney Thlocco was made, and the patents in pursuance thereof issued, through gross fraud and mistake of the Commission in charge of the enrollment of citizens of the Creek Nation, and the allotment of lands to said citizens, and that Barney Thlocco was not alive on April 1, 1899, and was therefore not entitled to allotment. The intervenors further allege that a judgment of the United States District Court for the Eastern District of Oklahoma had determined that Barney Thlocco was not entitled to enrollment, and that such judgment, while afterwards set aside by the court, was not void, but merely voidable; and that, between the rendition of said judgment and the setting aside of the same, Johnathan R. Posey was allotted the lands above described. The intervenors pray that they be decreed to be the owners of a valid oil and gas lease on the lands, and that their title thereto be quieted. The position of these

intervenors is, therefore, not antagonistic to that of the Government, and they have an interest in common with the appellant in obtaining the relief prayed for by the bill. No issue was made up or tried upon their intervening petition nor as between these intervenors and those opposing the Government, except as their interest was involved in the issues upon the bill and answer. At the trial, counsel for the intervenors were, therefore, permitted to appear with and on behalf of the complainant, and this brief is filed, as heretofore stated, in support of the appeal prosecuted by the Government, and for that purpose only.

Proceedings in the Trial Court.

The Government first offered in evidence that part of the approved roll of Creek citizens showing the name of Barney Thlocco stricken therefrom on December 13, 1906, by authority of the Department (Assignments 2 and 27, pages 20 and 23 herein). This offer was rejected on the ground that the Secretary of the Interior had no power to strike such name from the roll upon that date, because of the following provisions of section 5 of the Act of Congress of April 26, 1906:

“ That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter

issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs."

The court took the view that patents to the land, theretofore arbitrarily selected, having been prepared by the Dawes Commission, and signed by the Principal Chief of the Creek Nation on April 3, 1903, and duly approved by the Secretary of the Interior, the title to such lands, even although the patents were made in the name of a person admittedly dead, passed out of the Government and became vested in the heirs of Thlocco, by virtue of the above quoted provisions of the Act of 1906.

In view of this ruling, the Government next offered to prove (Assignment No. 6, pp. 20-23 herein) that from April 9, 1904, to December 13, 1906, the question of Thlocco's right to enrollment as a person living on April 1, 1899, was under investigation by the Department; that a hearing was had and evidence was taken and preserved upon that issue; that as a consequence thereof, and upon the evidence taken, the Dawes Commission found and determined that Barney Thlocco died prior to April 1, 1899, and was unlawfully enrolled, and the Secretary of the Interior, upon review of the evidence, finding and

decision of the Commission, approved the same and struck the name of Thlocco from the roll. This offer was made as a part of the Government's case, and for the purpose of showing that the provisions of the Act of April 26, 1906, could not, and were not, intended to nullify and put an end to the right of the Secretary of the Interior to pursue to final determination and judgment an inquiry and hearing begun in his Department long before the Act of 1906, and which hearing was pending at the time of the passage of that Act, if for no other reason than that the same section of the act itself provides that:

“ The provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior, at the date of the approval of this act.”

An objection was also sustained to this offer, and the Government then offered to prove by the independent testimony of witnesses who knew the facts that Barney Thlocco died prior to April 1, 1899. (Assignments No. 8 and 22, pp. 15-19 herein.) Objection was sustained to this offer, the court ruling that before any evidence of that character was admissible, the Government must prove by clear and convincing evidence that Barney Thlocco was enrolled without evidence as to whether or not he was alive

on April 1, 1899. Pursuant to the ruling of the court, and saving its exception thereto, the Government then offered the testimony of the officials and clerks of the Dawes Commission showing under what circumstances the enrollment of Barney Thlocco was made, and which testimony shows that whatever information the Commission had as to Barney Thlocco was received at Okmulgee prior to the time of the listing of his name for enrollment, and that such information, if any in fact was received—and it is not of record—was not relied upon by the Commission and the enrollment of Thlocco was made *tentative only, subject to further investigation*, as were hundreds of others at that time, and that the reason for such tentative enrollment was to satisfy the objection of the Creek National Council and to induce it to ratify the agreement. At the conclusion of this evidence, the Government renewed its former offers, which were again rejected on the ground that the Government had not made out a case sufficient to impeach the “judgment” of enrollment, and dismissed the bill. From such decree of dismissal, the Government appealed.

ASSIGNMENT *of* ERRORS.

The assignment of errors is set out in full in the brief of the appellant. We here call attention to those which involve the vital questions on this appeal and which are the subject of discussion in this brief:

The court erred in rejecting the following evidence of the witness Hector Beaver, offered by the complainant:

“ We offer to prove by this witness that he knew Barney Thlocco. He knew him for a number of years before his death. That the witness lived about a mile and a quarter northwest of the home of Barney Thlocco at the time of a small-pox epidemic in the Hilliby Indian settlement in the year 1899; that the witness remembers and will testify as to when Lee Patrick, the United States Indian Agent for the Sac and Fox Agency, which a g e n c y had its headquarters about six or eight miles northwest of the location of Hilliby settlement, established a pest camp at or near the home of this witness, and when a quarantine against the small-pox was established around the Hilliby settlement. And that prior to this time, which was in the latter part of January, 1899, Barney Thlocco died of small-pox. By this witness we further offer to prove that he the witness visited the home of Barney Thlocco the night before the death of Bar-

ney Thlocco, and at this time Thlocco was sick with the disease which the Indians thought was black measles. That several other Indians in the same locality were suffering from the same disease, but neither the witness nor the Indians in the locality knew the affliction to be small-pox until the establishment of the pest camp by the Indian Agent in January, 1899. That the lumber used to build the coffin for Barney Thlocco was taken from an old house belonging to the witness, and witness saw Barney Thlocco's grave in the Indian cemetery about 200 yards from the house of Barney Thlocco. That the witness saw Barney Thlocco's coffin on the porch of the house of Barney Thlocco. The witness will testify that the making of the coffin, the seeing of the same at the house of Barney Thlocco and observing the grave of Barney Thlocco was all before the establishment of the pest camp by Lee Patrick, the Indian Agent. Witness can and will further identify and fix the time by reason of the fact that several of the members of the witness' family died of this disease prior to the establishment of the pest camp and after the death of Barney Thlocco. That the witness will testify about the time the pest camp was established he visited the house of Barney Thlocco in company with one Jim Combest who was then engaged as a nurse for the Indian Agent in connection with the small-pox epidemic. That Combest took from this house on this occasion all the remaining members of the Thlocco family who were yet alive, and all of them were suffering from small-pox, these people being taken to the pest

camp. That at the time Thlocco was dead and buried. That about this time witness took Jim Combest to the home of Tuskegee Harjo who was suffering from the small-pox, and Combest took Tuskegee Harjo and the members of his family to the pest camp. Witness knows that Tuskegee attended the funeral of Barney Thlocco, and that Tuskegee Harjo died on the same night of his removal to the pest camp." (*Assignment No. 8.*)

The court erred in rejecting the following evidence which complainant offered to prove by the witness Hector Beaver and by the following other witnesses, to-wit: Figey Blueford, Ben Combest, Jim Combest, A. B. Comer, W. A. Christie, Martin Daugherty, Dan Dirt, J. J. Evans, Ben Hoter, Billy Johnson, Charlie Swift, Milammie, Thomas Vander-slice, Pete Washington, and other witnesses produced by the complainant, and by records and documentary evidence:

" That Barney Thlocco in whose name the patent was made in this case, died on or about the 10th day of January, 1899, at age of from forty-five to fifty years and prior to the 26th day of January, 1899; that Barney Thlocco was a resident of the Creek Indian settlement known as Hilliby, where he had resided a number of years prior to his death; that said settlement is situated in what is kown as Tuckabachie town, of

the Creek Tribe of Indians and of which Barney Thlocco was a member. That during the winter of 1898 and 1899 the small-pox broke out in the Hilliby settlement, which disease at that time was supposed and believed by the Indians to be black measles and was so believed by them to be black measles until the 26th day of January, 1899. That on the 26th day of January, 1899, Lee Patrick, the then Indian Agent of the Sac and Fox Agency near the Hilliby settlement, was directed by the Secretary of the Interior to take steps to eradicate this disease among the Indians; that Mr. Patrick made inquiry and found this disease to be small-pox, and established a pest camp, in the settlement, to which all the Indians afflicted with small-pox were removed; that the establishment of this pest camp was on the 26th day of January, 1899; that this pest camp was maintained until the eradication of the disease among the Indians in the spring of 1899; that Barney Thlocco died about two weeks before the establishment of this pest camp; that he was either the first or second Indian to die of this disease; that the first Indian to become afflicted therewith was Figey Blueford; that Barney Thlocco was a prominent Indian; that it was widely, generally and well known among all the inhabitants of this community that he died before the establishment of the pest camp on the date aforesaid; that a large number of the Indians, approximately seventy-five, in the community, died of the disease during the prevalence of this epidemic; that the official record of the small-pox camp kept by the

Indian Agent Patrick will and does show that only one of such Indians died after April 1, 1899; that the name of this Indian who died after April 1, 1899, was Osar-heneka; that the Indian Agent Patrick, who was then the Indian Agent of the Sac and Fox Agency, was an employee and representative of the Department of the Interior of the United States. That the following named Indians, to-wit: Tuskegee Harjo, Arch Johnson, Jimmie Deer and Sam Laslie attended the burial of Barney Thlocco, one of them having made his coffin and others of them having dug his grave and buried him; and that these same persons afterwards were taken with the small-pox and removed to the camp, and that all of them except Tuskegee Harjo died during the month of February, 1899, and that Tusekegee died January 27, 1899; that all of the members of the Barney Thlocco family, consisting of himself and three children, died of the epidemic about that time, except Thlocco himself, in the pest camp established in Hilliby shortly after the establishment thereof, and during the month of February, 1899, Thlocco himself having died at the time aforesaid; that Barney Thlocco's only living brother died during this epidemic in the month of February, 1899, after having been present at the death of Barney Thlocco and at the burial of Barney Thlocco. That this was the only small-pox epidemic that ever occurred in the Hilliby settlement, and that the epidemic left very few survivors in the settlement." (*Assignment No. 22.*)

The court erred in not permitting the complainant to introduce evidence in support of its allegation that Barney Thlocco died prior to April 1, 1899, regardless of the question as to whether or not the Commission to the Five Civilized Tribes in enrolling the name of Barney Thlocco, with the approval of the Secretary of the Interior, acted arbitrarily, and without any evidence, information, knowledge or belief as to whether or not he was living or dead on the 1st day of April, 1899. (*Assignment No. 30.*)

The court erred in rejecting certain evidence offered by complainant, to-wit: that portion of complainant's Exhibit 2, in words and figures as follows:

“ Stricken by order of Department, Dec. 13, 1906. (I. T. D. 22734-1906), Commissioner's File No. 55241-1906.” (*Assignment No. 2.*)

The court erred in rejecting certain evidence offered by complainant, as follows: Complainant's Exhibit No. 7, consisting of a certified copy of the records in the office of the Commission to the Five Civilized Tribes, pertaining to the cancellation of the enrollment of the name Barney Thlocco as a Creek citizen by blood, the full substance of said records being as follows:

“ A letter dated August 25, 1904, written by the Chairman of the Commission to the Five

Civilized Tribes to the Secretary of the Interior, advising that the attorney for the Creek Nation had moved the right of Barney Thlocco to enrollment to be re-opened, and transmitting the affidavits of Wilson Knight and Barney Yahola, relative to the date of death of said Barney Thlocco, and recommending that said case be re-opened on the ground that said Barney Thlocco died prior to April 1, 1899, and that a rehearing be ordered;

“ A letter dated September 7, 1904, from the Commissioner of Indian Affairs to the Secretary of the Interior, enclosing a report from the Commission to the Five Civilized Tribes, dated August 25, 1904, concerning the application of the attorney for the Creek Nation to have said case re-opened, and recommending that said motion be granted;

“ The joint affidavit made August 9, 1904, of Wilson Knight and Barney Yahola, stating that they personally knew Barney Thlocco and that he died prior to April 1, 1899;

“ A letter dated September 16, 1904, from the Secretary of the Interior to the Commission to the Five Civilized Tribes, granting the said motion to re-hear said case, and so advising said Commission;

“ The testimony of Jones Bear taken by and before the Commission to the Five Civilized Tribes on October 21, 1905, wherein he testifies, among other things, that Barney Thlocco died in January or February, 1899, and prior to the

date upon which the Creek Land Office was opened, to-wit, April 1, 1899; and

“ The testimony of Charley Simmer taken by and before the Commission to the Five Civilized Tribes on November 14, 1905, wherein he testified, among other things, that Barney Thlocco died in December, 1898, or January, 1899, and prior to the date upon which the Creek Land Office was opened, to-wit: April 1, 1899; the testimony of both said witnesses having been taken in the matter of the enrollment of Barney Thlocco, deceased, as a citizen by blood of the Creek Nation;

“ A notice dated February 9, 1906, addressed ‘To the heirs of Barney Thlocco, Arbeka, Indian Territory,’ signed by the Acting Commissioner to the Five Civilized Tribes, notifying said heirs that on February 19, 1906, a hearing would be conducted in the matter of the right of enrollment of Barney Thlocco, deceased;

“ A letter dated October 10, 1906, addressed to the Secretary of the Interior by the Commissioner to the Five Civilized Tribes, setting forth the various proceedings, beginning with August 25, 1904, had in connection with the rehearing of the right of Barney Thlocco to enrollment, and the various hearings conducted by the Commission, and the substance of the evidence received, and advising that it was conclusively established that Barney Thlocco died prior to April 1, 1899, and recommending that authority be granted for striking his name from the approved roll of

Creek citizens, opposite No. 8592, and transmitting the entire record in said matter; and

“ A letter dated December 13, 1906, addressed to the Commissioner to the Five Civilized Tribes by the Secretary of the Interior, stating, among other things, that the recommendation to strike the name of Barney Thlocco from the approved roll, was concurred in by both said office and the office of the Commissioner of Indian Affairs, and stating that said name had been cancelled by the Department from said roll, and that the Indian Office had been directed to take similar action, and authorizing said Commissioner to the Five Civilized Tribes to cancel said name from the roll in his custody.” (*Assignment No. 6.*)

The court erred in rejecting the following evidence offered by complainant: that portion of complainant's Exhibit No. 1, in the words and figures as follows:

“ No. 1, stricken from approved roll by authority of Department, December 13, 1906,”

and to prove in connection with the introduction thereof that that entry was made on said exhibit before March 4, 1907, and immediately after the receipt of the letter of the Secretary of the Interior directing the Commission to cancel the enrollment of said name Barney Thlocco, which said letter forms and composes a part of the complainant's Exhibit No. 7. (*Assignment No. 27.*)

The court erred in rejecting the following evidence offered by complainant: that portion of complainant's Exhibit No. 2, in words and figures as follows:

“ Stricken by order of the Department, December 13, 1906,”

and in not permitting the complainant to show that the above quoted portion of said Exhibit No. 2 was placed on the official roll of citizens by blood of the Creek Nation, opposite the name Barney Thlocco, pursuant to the letter of the Department of the Interior dated December 13, 1906, and immediately after the receipt of said letter by the Commission and prior to the 4th day of March, 1907.

BRIEF of the ARGUMENT.

1. That Barney Thlocco was in fact living on April 1, 1899, was an essential prerequisite to his enrollment as a Creek citizen, and a condition precedent to his right to receive an allotment of land in said nation, under the provisions of the Act of Congress approved March 1, 1901. The evidence offered by the Government to show that Barney Thlocco died during the small-pox epidemic in January, 1899, and that the fact of his death was well and widely known in his community, was relevant to the issue, and was also competent and material evidence, and should have been admitted, and it was error to exclude the same.
2. There was no trial, controversy or judicial proceedings before the Commission to the Five Civilized Tribes upon the issue of the date of the death of Barney Thlocco, resulting in a judgment that he was entitled to enrollment as a person living on April 1, 1899, so as to conclude the Government in a suit to cancel the allotment and the patents therefor, especially as against persons who could suffer no injury thereby, and the court erred in so holding.
3. There was no final and conclusive adjudication in favor of the right of Barney Thlocco to be en-

rolled as a Creek citizen and to receive an allotment of land, which could not be attacked by the Government on the ground that he was not living on April 1, 1899.

4. The enrollment of Barney Thlocco and the approval of such enrollment by the Secretary of the Interior was one administrative act, and there was nothing before the Secretary of the Interior upon which he could exercise judicial or *quasi-judicial* judgment by way of reviewing the action of the Dawes Commission.
5. Barney Thlocco was enrolled by the Dawes Commission upon the presumption that having been living at the time of the taking of the census in 1897 and 1898, he was still living on May 24, 1901, when he was listed for enrollment. The evidence offered by the Government to rebut such presumption and to show that he was dead prior to April 1, 1899, was therefore competent and it was error to exclude it.
6. There was no legal or substantial evidence before the Dawes Commission on May 24, 1901, or at any time prior to the approval of his enrollment, that Barney Thlocco was living on April 1, 1899.
7. The Secretary of the Interior had authority, on December 13, 1906, to withdraw his approval of the enrollment of Barney Thlocco and to cancel such enrollment on the ground that he was not

living on April 1, 1899, upon the finding and report of the Dawes Commission to that effect, and after a hearing for that purpose upon that issue. Proof of such cancellation of his enrollment was competent and it was error to exclude such proof.

8. The right of the Secretary of the Interior to withdraw his approval of the enrollment of Barney Thlocco is not affected by the fact that no notice thereof was given to his heirs. The failure to give such notice would not divest them of their rights, if any they had, but the cancellation of the enrollment destroys the presumption which it would, if not cancelled, have afforded as *prima facie* evidence of his right to enrollment and puts the burden upon the defendants of proving that he was living on April 1, 1899.
9. The allotment, having been arbitrarily selected by the Dawes Commission without application therefor by any person, and the allotment certificate and the patents for such allotment having been issued in the name of Barney Thlocco long after his death, and never delivered, were void and did not operate to vest the title in his heirs.
10. The fact of the enrollment of Barney Thlocco was not in itself an adjudication of his right to be so enrolled, but if so, as contended by the defendants, then the court erred in holding that the same tribunal could not re-open the inquiry

and reverse its judgment, and it was error for the court to exclude the evidence offered by the Government that such alleged judgment had been reversed after full investigation and inquiry as to the date of the death of Barney Thlocco.

11. Neither the alleged heirs of Barney Thlocco nor their grantees or lessees acquired any title to the land involved, because such title is still in the Creek Nation, and in any case, those opposing the Government did not claim or plead that they are *bona fide* purchasers but simply asserted the validity of the proceedings relative to the enrollment of, and the allotment of the land in controversy to, Barney Thlocco.

A R G U M E N T

The position of those resisting the cancellation of the patents is not the position of innocent third persons asserting vested rights acquired in reliance upon the action of the Commission to the Five Civilized Tribes in the enrollment of Barney Thlocco and in the issuance of a certificate and patents for the lands in controversy, for they do not plead that they are bona fide purchasers, but stand squarely on the proposition that the enrollment of Barney Thlocco and the issuance of the patents in question are conclusive of all the matters alleged in the bill, and are therefore immune from attack. Their theory is that the fact of Barney Thlocco's enrollment is *res judicata* of his right to be so enrolled and of the fact that he was living on April 1, 1899; that because of the act of enrollment itself, and the circumstances surrounding that act, they infer that there must have been, of necessity, some evidence of Thlocco's right to enrollment, and that whatever its quantity or quality, it was sufficient to satisfy the Commission, and the Government could not maintain this action, unless it showed affirmatively, by clear and convincing proof, that there was no evidence of any kind or character whatever on the question as to whether Barney

Thlocco was living or dead on April 1, 1899, or that the enrollment was obtained by fraud, extrinsic and collateral to the matters which they claimed were tried and adjudicated upon.

The contention of the Government is that Barney Thlocco was in fact not living on April 1, 1899, and that the contrary was never found or determined prior to his enrollment; that there was neither in fact nor in law an adjudication of his right to enrollment nor of the fact that he was living on April 1, 1899; that in a suit of this character, it cannot be inferred from the act of enrollment itself, on the theory that such a finding is necessary to support the enrollment, that such finding will be presumed; that the testimony submitted by the Government shows that there was no proof before the Dawes Commission amounting to legal and substantial evidence, that Barney Thlocco was living on April 1, 1899, and that even if there was, it could not conclude the Government or the Creek Nation, neither of which was a party to the proceedings, which were purely *ex parte*, at which the evidence, if any, was heard, nor to estop the Government or the Creek Nation from showing that such evidence was false; that there was no necessity, in order to maintain this action, of pleading or proving collateral or extrinsic fraud in the enrollment; that the allotment was arbitrarily made

and the patents issued to a person who was then dead, and that so far as his right to an allotment of Creek land was concerned, Barney Thlocco was a mere myth and the patents to the land were void.

Before discussing the legal propositions here suggested, we desire to state briefly the testimony of the Government relative to the circumstances under which the enrollment was made. The Government felt that it was its duty, in view of the ruling of the court, to obtain the testimony of all available persons intimately connected with the enrollment of Creek citizens, and these persons testified substantially as follows:

EDWARD MERRICK:

This witness testified that the last two or three days before May 24, 1901, the date of the ratification by the Creeks of the Original Creek Agreement, the Commission listed for enrollment between 200 and 300 names per day; that up to the time that the enrolling party went to Okmulgee, there were a great many names on the 1890 and 1895 authenticated tribal rolls, unaccounted for, that is to say, no one had appeared at the office to ask for their enrollment, and that while at Okmulgee they brought in a great many applicants by means of wagons and teams that had been sent all over the country. There was a

provision in the agreement that no names should be added to the roll after its ratification and the impression was that it was necessary that all persons who appeared on the tribal rolls unaccounted for should be listed on a card

“so we could say they were listed prior to the ratification of the agreement, and in order to do that the Creek Council held off two or three or four days acting on the agreement until we had gone through both the 1890 and the 1895 rolls.”
(Tr., p. 67.)

That the Commission was endeavoring on that occasion to put on cards the names of all unaccounted for citizens. The plan of the Commission in preparing the final roll was to place on the so-called schedule approximately 500 names and to transmit each schedule one at a time to the Secretary of the Interior for approval, and the so-called schedules, when approved, became the final roll. The witness further testified:

“ I would have to say that after Thlocco's name was listed on the card at Okmulgee on May 24, 1901, there was some investigation upon the question as to whether or not he was living or dead on April 1, 1899, *because it was a prerequisite to their right to enrollment that they be living on that date, and the Commission would have to be satisfied, or have information of some kind that he was living on that date.*

We were, however, often imposed upon. The handwriting on the Thlocco card made in 1901 is mine. It was made up in its entirety in Okmulgee on May 24, 1901, and was completed on that day. Some cards were not completed that day. In cases where cards were completed at that time, I don't think that was an end of a determination of the question as to their right to enrollment, but it was the end of the listing for enrollment, but oftentimes I remember we would get information afterwards, and before transmission of the final roll, that the person so listed was not so living on April 1, 1899, and in cases where we had filled out all the information on the card the matter of the right of the person, whose name appeared thereon, to enrollment was treated as settled unless we obtained further information which somebody voluntarily gave, but where said cards were not so completed, we afterwards sent out identification parties to make inquiries, and I couldn't say that after May 25, 1901, there was any investigation in Thlocco's case, but I would say that the conclusion that we came to over at Okmulgee had not been changed by any one appearing or offering any evidence to the contrary.

“ We knew that Thlocco was dead, and we *apparently were satisfied* at Okmulgee that he was living on April 1, 1899, but that *don't preclude further investigation. I was satisfied of that before I prepared the schedule, and submitted it to Mr. Bixby, but I don't know what satisfied me.* We would ask Town Kings and Town Warriors when they came in, and anybody

else, if they knew this or that, and most of the Creeks had selected their allotments before that time and we could tell whether they were living or dead on April 1, 1899, by the allotment records, for they began tentative allotments on April, 1899. There were no approvals of enrollments until some time in 1902." (Tr., pp. 68-69.)

" * * * Q. Isn't it a fact, Mr. Merriek, that you took the name of Thlocco from the old census card when you made up this card?

" A. I used the old census card I am certain of that, yes, sir, for that gave me the parentage and degree of blood. I will have to say that in view of the fact that the age on the old census card is given as 40 and that on the new is 35, and the post-office is different, that *I must have had some information* other than the old census card. The old census card was secured, I think, by Mr. Hopkins, when he was out in the field and they were made for persons then living. On the last three or four days before May 25, 1901, people, the Town Kings, the Town Warriors or other prominent Creek citizens, would appear in behalf of others and ask to have certain persons listed, but if no one appeared then, we took these tribal rolls and just took the name that appeared on the roll and the tribal enrollment and made a census card for them, but where we had an old census card, we had other data, we had the parentage, the blood and the age. As a general rule, the cards we made up then were completed because we had that information

from the old census cards, but I would think that in all cases where the card was completed in every respect over there that some one must have appeared, because those old census cards were made prior to April 1, 1899, and we didn't know whether they were living or dead. I can't remember whether I personally learned anything about whether Thlocco was living or dead on April 1, 1899, I don't remember it if I did." (Tr., p. 70.)

" * * * Q. Now, let me ask you this: Did you enroll during that two or three days there when you were listing these names that were unaccounted for, did you list those names for enrollment when you were satisfied they were living on April 1, 1899, or did you list them when you were not satisfied they were dead on April 1, 1899?

" A. We listed every name unaccounted for that was on the 1890 and 1895 rolls. A great many of them we didn't know whether they were living or dead and we didn't know when they died, if dead.

" Q. Now, it was under that circumstance that you listed the name of Barney Thlocco?

" A. He was one of the unaccounted for. The descriptive features which we placed on the census cards were the age, the blood, tribal enrollment and parentage.

" Q. Now when you completely filled out a card, it meant that you had determined that the person was entitled to enrollment, did it not?

“ A. Not necessarily determined that he was entitled to enrollment, but determined the fact that we thought he was entitled to be enlisted for enrollment.” (Tr., p. 73.)

“ * * * My explanation of my failure to note on the final census card of Barney Thlocco the fact of his death would be that at that time we had no proof of death and regular affidavit made on the form that we had. I don't think that during the process of enrollment we made a notation on a card showing the death with ink. Oftentimes we would make a note with a soft lead pencil on there; just verbal information, but when we noted on the card the date when he died, I think in all cases we had a proof of death in affidavit form. I don't think we would put the notation on there with ink until we had some proof, until we got the affidavit, I think that was the practice. It is possible that for want of the affidavit stating the exact time of his death, we didn't make any notation on the card, and I think that is in accord with the practice.”

On redirect examination, said witness testified:

“ Q. In other words, you wanted proof of death?

“ A. Yes, sir, we wanted proof of death when we made the notation on there.

“ Q. So that the question could be determined?

“ A. Yes, sir.” (Tr., p. 89.)

PHILLIP B. HOPKINS:

This witness, who was Chief Clerk and Chief Attorney for the Dawes Commission, testified that he was one of the party sent by the Commission to Okmulgee, just prior to the ratification of the Original Creek Agreement; that there had already been a large number of citizens enrolled and that the Commission proceeded with the work of enlisting for enrollment, citizens, or names upon the tribal rolls, who had not been disposed of, so far as being listed for enrollment was concerned, and that there were a number at that time who had made no appearance and for whom no application for enrollment had been made. He further testified:

“ In considering the proposed Creek Agreement, the question was raised by officers of the tribe that the first sentence of section 28 might be construed to mean that the roll we were making could not be added to after the date of the ratification of the treaty, that sentence reads: ‘No person except as hereinafter provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.’ As a result of the possibility of their construction being correct, we entered *tentatively* on the census card, or census cards, the names that appeared upon the tribal rolls that had not been listed for enrollment; they were so listed on the regular cen-

sus cards. When we finished listing for enrollment those we did have information about, we had some that we did not have information about, and we listed them because of the possibility of the construction of the treaty that some of the council members contended for. The practice of the Commission and the rule had been that all adults should appear in person and apply for enrollment. We accepted applications by one person for another only in the case of minor children, from parents and guardians, and we had continued the practice up to that time. For practically 60 days we had had different parties out using every means at our disposal to get these people to come in for enrollment and just prior to the ratification of this agreement, if I remember, there were still a number who had not appeared, whose names did not indicate that they appeared and their names were entered on one of these new census cards, the regular census cards. Officers of the Creek Nation said 'what is to become of those who haven't yet appeared?' and that if the agreement is ratified some people contend that they never would have a chance to get on the roll and that they would like to have their names entered up. Just what information we got as to those people, I can't tell now, but there were representatives of the Creek Nation present and the Creek attorney; the Town Kings were all there at that meeting, and we endeavored to get all the information we could; if there were any names concerning whom we couldn't get information at that time I can't recall it; still, it might be possible. If there had

been a few names or a number of names on the tribal rolls concerning whom we couldn't get information from those who were present at that time, officers of the tribe, members of the council or the Creek attorney, it may be possible to relieve their doubt as to whether they might be listed afterwards, that we entered even those on the cards for further investigation. I presume that there were a number of names entered on the cards just before the ratification of the treaty under the circumstances I have just related. (Tr., pp. 77-78.)

“ * * * The notation on the 1895 Tuckabachie Town roll opposite the name Barney Thlocco, 'Died in 1900' is in my handwriting. Such notations as that came to be made on the tribal rolls because prior to the Original Creek Agreement, ratified May 25, 1901, and while we were working under the Curtis bill, we were not authorized to enroll deceased Indians and were only enrolling living Indians. (Tr., p. 78.)

“ * * * With reference to the notation 'Died in 1900,' placed opposite Barney Thlocco's name on the 1895 tribal roll, I would say that evidently somebody gave me the information upon inquiry about Barney Thlocco, and possibly in the examination of this roll with other names, that he had died in 1900. I don't know who may have given me that information. I don't know what use was made of the notation, but I know it was intended that when the Commission came to pass on that name for final record on the roll that an inquiry should be made as to when Thlocco

died or whether he was dead and get the proper death affidavit and death proof. (Tr., p. 78.)

“ * * * The old census card was intended to be a record of the applicant for enrollment; the new census cards were not made up from the old cards, but the latter were referred to at times where there was doubt as to the number of children in the family or we wanted to get some additional information, for the rule after April 1, 1899, was that all people should appear in person, and make application for their enrollment and allotment, except in the case of minors, and we did not copy the new cards from the old cards unless there was no application or appearance made for them. I think it must have been after the work was along toward completion that we had some of the clerks check the old cards with the new ones, mainly to avoid duplication of names, for when we were in the field and had no tribal rolls whatever to guide us the Indian name was frequently given by a full blood or by somebody representing another, when, as a matter of fact, the town kings had been carrying them on the tribal rolls under their English or school names. In each case, however, a new census card was supposed to be made and the old census card was not the thing from which the final roll was made.” (Tr., p. 79.)

ED HASTAIN:

This witness testified that he was in Okmulgee in May, 1901, aiding in the work of enrolling Creek citizens. His testimony in part is as follows:

“ All the names that appeared on the 1890 and 1895 tribal rolls that had not been listed for enrollment were listed for enrollment there prior to May 25, 1901, is my recollection. The occasion for enlisting them was in order to satisfy the Creek Council who were to vote upon the ratification of the Creek Agreement, because some of them feared that if they ratified this agreement, there might be some citizens who were not enrolled and under section 28 of that treaty the Commission would not have authority to later enroll them. I assisted in making up the census cards on that occasion and there were approximately two thousand filled out during that month.”

“ Before May 25, 1901, there were a large number on the tribal rolls who had not been listed for enrollment, and we placed those names on census cards *without a determination of the question as to whether they were living or dead on April 1, 1899; we had no information as to that.* When we enrolled a deceased person we made a memorandum on the bottom of the census card that he was dead, giving the date, or if we had a death affidavit, we would say ‘see death affidavit attached hereto or in jacket so and so.’ If we didn’t have a death affidavit, we simply made the memorandum in ink.” (Tr., pp. 84-85.)

“ * * * There were two classes of cases at the Okmulgee meeting, one where we were satisfied on evidence and the cards were left incomplete, and where we were not satisfied we subsequently

conducted an investigation to determine from evidence the right to enrollment. I was clerk in charge of the Creek enrollment division prior to the time we were at Okmulgee and subsequent thereto up until the time of my resignation and during that time I investigated as far as I could these incomplete cards and completed the enrollment; however, during the time we were at Okmulgee, we had a large force on that work and I did only a portion of that enrollment.” (Tr., p. 86.)

“ * * * I think we must have had in mind prior to May 25 the question as to whether citizens were living or dead on April 1, 1899, because the agreement had been enacted by Congress and was pending for ratification by the Creek Council, and we knew what was in that agreement, and we were framing our work so that if it was ratified, we should not have it to do over again. I am sure we did that, and it is my recollection that where we found that a person was dead at that time and that he was living on April 1, 1899, *that fact was noted on the census card.*

“ Q. Now, if you didn't have information on that subject, and you completed a card there, you treated that person as living at the time you made the card?

“ A. Yes, sir.

“ Q. And enrolled him as a living citizen?

“ A. Yes, sir.” (Tr., pp. 87-88.)

JOHN G. LIEBER:

This witness testified that he was a member of the field party at Okmulgee in May, 1901.

“ On the last two days before the treaty was ratified we didn't consider it necessary in order to complete a card, showing identification of a citizen, to show on that card whether he was living or dead. The date for the ratification of the treaty had been agreed upon among the members of council, that is, May 25, 1901, and the Commission found that there was a large number of people on the Creek tribal rolls who had not been accounted for and something had to be done to preserve their rights for them if they had any and were living, so the last two or three days before the treaty was ratified, we took the 1890 and the 1895 rolls and put everybody on a census card who was on these rolls unaccounted for, unless we had information at that time that they were not entitled to enrollment. This was done on the theory that the treaty provided that no person could be enrolled after the ratification of the agreement. *We put them on because of the theory that if they were not entitled to enrollment they could be stricken from the roll afterwards upon investigation as to whether or not they were living on April 1, 1899, then if any investigations were made as to whether they were living April 1, 1899, or not, and that fact determined by the Commission it would either have appeared on the census card, or if sworn testimony was taken, it would have been transcribed*

and the record preserved, that was the universal rule and practice of the Commission. I don't remember of a case where there was a contest as to citizenship rights but that testimony was taken and reduced to writing. In cases where there were trials and contests, evidence was taken and preserved; in cases in which there was no trial or hearing of contest, and where there was no evidence preserved, the record was made up by noting on the card in ink if they enrolled a deceased citizen. If they knew at the time the roll was made that he was dead, it would be noted on the card in ink. If the census card was complete and contained no notation that the citizen was dead, that would indicate that he was living at the time the card was made; the fact that he was on the roll and there was no notation made that he was dead, then he was presumed to be living. I don't mean to say that that notation was made on the tribal roll; it was made on the census card.

“ I have no recollection at this time about the enrollment of Barney Thlocco at Okmulgee, that is no independent recollection of that enrollment. The notation in pencil opposite his name, ‘died in 1900,’ on the 1895 tribal roll, I have seen. I probably saw it at Okmulgee at the time he was enrolled there, and I saw it again today. Such a notation as that on the tribal roll meant that the clerk, in making the enrollment should be on his guard and make inquiry; that is all it meant. It meant that somebody had furnished, in that case, Mr. Hopkins, information that that party was dead, or whatever notation was made on the roll, but it simply served to put the Com-

mission on their guard, and suggested further inquiry, further investigation. Looking at the census card of Barney Thlocco and eliminating these red lines, which were put on there in 1906, there is nothing on that card to indicate whether he was living or dead on May 24, 1901, nor to indicate whether or not an investigation was made afterwards as to his death. I want to modify that by saying that the card itself as made out would indicate that he was alive on May 24, 1901, when you eliminate the notation 'No. 1 stricken from approved roll by authority of Department December 13, 1906'." (Tr., pp. 90-91.)

" * * * Q. Now could you tell whether or not the clerk in making up this last card got some additional information over and above what was on the first card?

" By Mr. Davidson: We object to that as purely speculative.

" By Mr. Stuart: Your honor, I am cross examining this witness.

" By the Court: They are cross examining.

" By Mr. Davidson: Exception.

" A. Yes, he certainly must have. That indicates to me that the man making out this last census card got some information some place.

" Q. As a matter of fact, Mr. Lieber, this card shows that the man made an investigation independent of the first census card, don't it?

" A. Judge, I will say that on the date, the 24th day of May, and the day before that, there

was no investigation made of anybody's enrollment except information that was voluntarily given there by the Town Kings or somebody that was present. We hadn't time to investigate.

“ Q. Well, then, I will leave out the word investigate. I will say didn't he get some evidence?

“ A. Yes, he got some information from somebody.

“ Q. He got then, some information, independent of the first census card and by that information, independent of the first census card, he made out the last census card, didn't he, Mr. Lieber?

“ A. Yes, sir.” (Tr., pp. 92-93.)

“ * * * The discrepancy between the old census card and the new census card in the matter of age and post-office address which indicates that information had come to the party conducting the enrollment work does not indicate that any information had come as to Thlocco's death. All I know as to the making of the final rolls that went to Washington is as to how they were made. I did not assist in making the final rolls.” (Tr., p. 94.)

TAMS BIXBY:

This witness was a member, and chairman, of the Dawes Commission at the time of the enrollment of Barney Thlocco. He was at Okmulgee with the

enrolling party in May, 1901. Referring to the Government's Exhibit No. 1, being the census card on which the name "Barney Thlocco" appears, the witness testified:

" We had field parties out all the time and they were instructed to report on these facts from time to time as to when men died and all about it. We spent thousands and thousands of dollars getting that information. We kept no record of testimony, only when there was supposed to be a contest or likely to be, outside of that on the cards. We acted on the best information we could get.

" Q. Sometimes it was hearsay, sometimes direct, sometimes from the town king, sometimes from inhabitants near the party, sometimes report made by your field men? You took the best information you could get?

" A. We had the assistance of the best men in the tribe as well as our own field parties."

On redirect examination, said witness testified substantially as follows:

" Q. How would that information get to your Commission for consideration?

" A. Why, frequently, we heard it ourselves. I heard a great deal of it.

" Q. Suppose you didn't hear of it?

" A. Then we took the judgment of the clerks on the cards. Unless it was called to my attention or to the attention of some Commissioner.

“ Q. I believe you answered c o u n s e l that many thousands of dollars was spent by your Commission in sending parties out to obtain information?

“ A. Yes, sir.

“ Q. You, of course, could not carry their reports in your mind?

“ A. No, we did carry a good many of them.

“ Q. Why, did you have to, Mr. Bixby? State whether or not it is true that you required all of those persons to submit to your Commission the written result of their investigation?

“ A. Frequently only a memorandum; and frequently it was made by full-blood Indians who couldn't write English or couldn't take shorthand reports and we could get nothing from them but verbal reports.

“ Q. Evidence gathered in this manner—how did that information get to the Commission?

“ A. Frequently it was reported to the clerks and frequently to the Commissioners.

“ Q. Verbally?

“ A. I took some of it myself.

“ Q. In the Barney Thlocco case, did you take any?

“ A. I have no recollection about the Barney Thlocco case whatever. I haven't the slightest recollection about it.” (Tr., pp. 101-102.)

“ * * * As a matter of fact when I would take this card I would have the card and the clerk would have the schedule. When I took the card

I went over it several times with the clerks and would find out from the clerk all the information that he had with reference to that card several times. I expect I have talked with the clerks about every card more than once." (Tr., p. 103.)

This testimony establishes certain things :

1st. That Barney Thlocco, whose name appears on the 1895 tribal roll, had been ascertained to be living in 1897 or 1898, when the old census cards were made.

2nd. That some information, prior to the passage of the Original Creek Agreement had been furnished that he was dead and that he died in 1900, which information was placed on the tribal roll in the form of the following notation: "Died in 1900."

3rd. That at the time this notation was made and the reason for it, was that under the Curtis Act (July 28, 1898), the Commission was authorized to enroll living persons only, and which notation served to put the Commission on inquiry as to the fact suggested, but was not a finding or determination of that fact.

4th. That there was no contest, controversy or hearing relative to the time of Barney Thlocco's death, or whether he was in fact dead, and that in

truth he was listed for enrollment on May 24, 1901, upon the presumption that he was then alive.

5th. That the name of Barney Thlocco was listed tentatively on May 24, 1901, and subject to further investigation, in order to satisfy the doubts of the Creeks, who delayed ratification of the agreement for that purpose.

6th. That neither at the time of such listing of his name for enrollment, nor prior to the making up of the schedule containing his name and submitted to the Secretary for his approval, was there any determination, other than the act of enrollment itself, that Barney Thlocco was living on April 1, 1899; that there was no issue on that fact and no evidence taken or heard, except that the officers and clerks of the Dawes Commission inferred and concluded that some information was obtained relative thereto; otherwise, according to the custom and practice of the Commission, he would not have been enrolled.

I.

Under the issues of fact made by the bill and answer, the evidence offered by the Government to show that Barney Thlocco died prior to April 1, 1899, was relevant.

The fundamental and vital facts alleged by the bill are that Barney Thlocco, who was enrolled by the Dawes Commission as a Creek citizen by blood, died in the beginning of the year 1899, and prior to April 1, 1899, and was, therefore, not entitled to enrollment or to receive an allotment of land in the Creek Nation; that there was no hearing, contest or controversy by, or investigation before, the Dawes Commission as to his right to be enrolled and that no notice was given to the Creek Nation or its officers of the Commission's intention to enroll him. The answer denies that Barney Thlocco died prior to April 1, 1899, but alleges that he was living on that date, and that the Commission, in enrolling him, acted in accordance with the law, and upon evidence which they found to be sufficient in law and in fact to authorize his enrollment. By this answer, we submit, but a single issue of fact was tendered, whether Barney Thlocco was living on April 1, 1899, the Government denying it, the defendants affirming it. Under the pleadings there was no other issue of fact in

the case. The bill admits his enrollment and necessarily admits all the presumptions which the enrollment carries with it, but the bill also alleges that there was no hearing, contest or controversy about the date of his death; that there was no such issue or trial of that issue, and that such enrollment was purely *ex parte* and without notice to the Creek Nation. These allegations are not denied by the answer, and are, therefore, admitted. The allegation in the answer that the Commission did not make a mistake but acted in accordance with the law, is, of course, stating a mere conclusion. The allegation that the Commission did not act without evidence, but that it enrolled Barney Thlocco upon evidence which was satisfactory and sufficient in law and fact, is not a denial that the proceedings before the Commission were wholly *ex parte*, and of course, do not amount to an assertion that there was a contest, hearing or trial between adversary parties resulting in a judicial finding and judgment on the issue of Thlocco's death. The Government offered to prove that Barney Thlocco had died prior to April 1, 1899, and singularly enough, the defendants objected to any evidence in support of the issue of fact which they themselves had tendered by their answer. That such evidence was admissible as relevant to the issue thus made is perfectly clear, without argument to support it.

There was, prior to his enrollment, no adjudication in the applicable sense of the term, that Barney Thlocco was living on April 1, 1899.

The defendants contend and the court took the same view of the matter that to admit the evidence offered by the Government would be to re-open and re-try an issue once determined and disposed of; that the date of the death of Thlocco to which the evidence was directed had been adjudicated by the Dawes Commission in favor of his right to enrollment, and that the Government was concluded thereby. The trouble, of course, with this position is that no such issue in fact was ever tried, and both the court and counsel failed to distinguish between those proceedings which are *ex parte* and those which are adversary, upon a disputed issue of fact and which result in a binding judgment conclusive in its character and effect.

That the Dawes Commission possessed *quasi* judicial powers may be conceded, but that it exercised such a power in the enrollment of Barney Thlocco we deny. In the first place, the Commission did not act as a body, or sit as a tribunal at any time in respect to his enrollment, or his right to be enrolled. Practically all of the judicial opinions relied on by the defendants, in which the doctrine is announced, were in cases in which the entire Commission sat as

a body, or at least conveyed that idea, to hear evidence and give judgment thereon. The great majority of questions, and particularly as to an individual Indian's right to enrollment, or to a particular allotment, were heard before an individual Commissioner in a purely administrative way. Often such matters were left to the decision of subordinate clerks. No evidence was taken and preserved of record and the questions were determined in some instances upon information of any kind that might come to the Commissioner or clerk, without the sanction of an oath, and with no assurance that it was correct. In the case of the enrollment of Barney Thlocco, the only Commissioner who seems to have had anything to do with the matter, was Tams Bixby, the chairman of the Commission. He testified that in preparing the schedule for submission to the Secretary of the Interior, he talked with the clerks and got whatever information they had, very often taking the judgment of such clerks if he himself had not personal knowledge. In the second place, there was no formal inquiry conducted by the Commission or by any Commissioner or clerk as to whether Barney Thlocco was living or dead on April 1, 1899. No issue was framed or determined. There was no judicial finding of fact nor judgment upon that fact. Before there could have been a finding of fact and a judgment and decision based on it, the fact must have

been in issue. In *Miles v. McCallan*, 3 Pac. 610, it was said:

“ A finding of fact is the determination of a fact by the court, which fact is averred by one, and denied by the other, and this determination must be found on the evidence in the case. Such facts as are properly averred on the one side, and properly denied on the other, constitute the issue in the case. All findings outside of these issues are of no legal force or value.”

The enrollment of Barney Thlocco was upon *ex parte* proceedings and was purely an administrative or executive decision. The record shows this to be a fact and the defendants admit it in their answer by failure to deny the allegations of the bill in that respect.

In *United States v. Minor*, 114 U. S. 233, in speaking of the character of proceedings before the Land Department, the court said:

“ In nine cases out of ten, perhaps in a much larger percentage, the proceedings are wholly *ex parte*. In the absence of any contesting claimant for a right to purchase or secure the land, the party applying has it all his own way. He makes his own statement, sworn to before those officers, and he produces affidavits. If these affidavits meet the requirements of the law, the claimant succeeds, and what is required is so well

known that it is reduced to a formula. It is not possible for the officers of the government, except in a few rare instances, to know anything about the truth or falsehood of these statements. *In the cases where there is no contesting claimant, there is no adversary proceeding whatever.*

“ * * * *It needs no other remarks than those we have already made, as to the nature of the proceedings before the land officers, to show how inappropriate this language is to such a proceeding. Here no one question was in issue. No issue at all was taken. No adversary proceeding was had. No contest was made. The officers, acting on such evidence as the claimant presented, were bound by it and by the law to issue a patent. They had no means of controverting its truth, and the government had no attorney to inquire into it. Surely the doctrine applicable to the conclusive character of the solemn judgments of courts, with full jurisdiction over the parties and the subject matter made after appearance, pleadings and contests by parties on both sides, cannot be properly applied to the proceedings in the land office in such cases.*”

In *Mill v. Brown*, 54 Fed. 987, it was held that decisions of the Land Department must not only be based on legal evidence, but upon some formal inquiry or trial at which the parties affected have a fair opportunity of presenting evidence. One of the last cases on this question is that of *Washington Securities Co. v. United States*, 234 U. S. 76, which was

a suit to cancel certain patents under the provisions of the Homestead law. The court said:

“ It is contended also that the proceedings resulting in the patents were not *ex parte* but adversary; that the land officers found the lands to be agricultural in character, and that this finding was conclusive upon the Government. No doubt these officers found from the proofs submitted to them that the lands were agricultural and not coal lands, for that was a prerequisite to issuing the patents, but the proceedings were not adversary in any true sense of the word. The applications and proofs of the entrymen were strictly *ex parte*. The Government was not called upon to make any adverse showing, no issue was framed, no hearing was had, and no one represented the Government save in the sense that the land officers did so.”

It was urged that the Circuit Court of Appeals for the Eighth Circuit in *Kimberlin v. Commission*, 104 Fed. 653, and kindred cases, has held that the acts of the Dawes Commission, in enrolling applicants, were judicial and that the act of enrollment was entitled to all the force of a judgment. That is true where a collateral attack is made upon such judgment. The *Kimberlin* case was an application by Mary Jane Kimberlin for a writ of mandamus to compel the Commission to the Five Civilized Tribes to enroll her as a citizen of the Chickasaw Nation,

upon certain facts disclosed by her complaint. In the course of its opinion, the court quoted from the Act of June 10, 1896, conferring authority upon the Commission to *hear and determine* the application of all persons who applied to them for citizenship in any of said nations, and *after such hearing*, they shall determine the right of such applicant to be so admitted and enrolled, and that in the performance of such duties, the Commission should have power and authority to administer oaths, to issue process for and compel the attendance of witnesses, to send for persons and papers and other evidence, and to use every fair and reasonable means within their reach for the purpose of determining the the rights of persons claiming such citizenship. The court called attention to the subsequent acts authorizing the Commission to continue the authority conferred on it, and stated that it was under the provision of these Acts of Congress that the Commission heard the claim of Mary Jane Kimberlin, and *decided, after hearing and determining the merits* of her application, that it could not enroll her as a citizen of the Chickasaw Nation. There was some contention as to whether her application was filed in time, but, regardless of that question, the court said:

“ Conceding, however, but not deciding, that the application of the plaintiff in error was in time to entitle her to a hearing and decision, that

the facts which she alleged were admitted, and that it was the duty of the Commission to hear and decide the question of her right to citizenship, according to the law and the very right of the matter, the power and duty of the courts below and of this court are no less certain. It is conceded that the Commissioners are executive officers. It is not their sole or chief function to hear and determine controversies between contending parties. Nevertheless, in the determination of the citizenship of the parties who apply to them for membership in the Five Nations, they are vested with judicial powers by Acts of Congress. They have authority to compel the attendance of witnesses, to send for persons and papers and hear evidence, 'to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship' and above all they are empowered 'to hear and determine the application of all persons who apply to them for citizenship.' This grant of power is plenary. It vests the authority and imposes the duty upon this Commission to hear and decide every question of law and of fact which is material to the right of the applicant to enrollment as the citizen of a nation. Take the case at bar. The facts are conceded. But do these facts entitle the applicant to enrollment as the citizen of the Chickasaw Nation? Does the provision of article 38 of the Treaty of 1866, that 'every white person, who, having married a Choctaw or Chickasaw, resides in said Choctaw or Chickasaw Nation * * * is to be deemed a member of said nation,' apply to those who,

like the plaintiff, were married subsequent to the adoption of the treaty? Are the amendments of the laws of the Chickasaw Nation made by its legislature in 1887 and 1890 which by their terms prohibit the plaintiff from acquiring any rights of citizenship in that nation by her intermarriage with the white widower of a deceased Indian woman, void, in the face of the treaty, or are they consistent with its provisions and with the Acts of Congress, and fatal to the claim of the plaintiff in error? The consideration and decision of these questions were indispensable to the determination of the plaintiff in error's right to the citizenship she sought, and the Acts of Congress intrusted their consideration and decision to the judgment and discretion of the Commission and not to those of the courts. Under these Acts of Congress, the Commission to the Five Civilized Tribes is a special tribunal vested with judicial power to hear and determine the claims of all applicants to citizenship in the Five Civilized Tribes, and its enrollment or refusal to enroll the applicant in each particular case constitutes its judgment in that cause. In the case before us, this tribunal has heard and determined the claim of the plaintiff. Whether its decision was right or wrong is immaterial in this court, and that question will not be considered. Congress saw fit to entrust to the judicial discretion of the Commission the determination of the application of the plaintiff in error, and of every question of law and of fact which that decision involved. Under the settled rules to which attention was called in the

opening of this opinion, no court has jurisdiction by the use of the writ of mandamus, to substitute its own opinion for that of the tribunal, to which the law intrusted the decision of these questions, to control the judicial discretion of that tribunal, to correct its errors or to reverse its decision. The judgments of the courts below were right, and they are affirmed."

Nunn v. Hazelrigg, 216 Fed. 332, was a suit in ejectment in which the right of one Tenadan to be enrolled as a Creek by blood, while in fact a negro, was raised by the answer of the defendant. He had taken a deed from the allottee, knowing her to be a negro, and without knowledge of the fact that she had been enrolled as a Creek, a circumstance which, of course, affected the alienability of her allotment. It was held that her enrollment as a Creek by blood fixed her status as against *collateral* attack. This same doctrine was clearly announced in *United States v. Winona & St. Paul R. R. Co.*, 67 Fed. 948, in which it was said that a patent to the public land was impervious to *collateral* attack on the ground that the patentee was not entitled to it, but that such patent could be avoided in a suit in equity *directly* attacking the patent because issued erroneously.

There is certainly nothing in these cases to support the contention that the enrollment of Barney Thlocco was an adjudication of the fact that he was

living on April 1, 1899, which concluded the Government in this suit. There was no application for his enrollment; there was no formal inquiry or trial upon the issue whether or not he was living or dead on April 1, 1899; neither the Creek Nation nor the Government were present, except in the sense that the Dawes Commission represented the Government; there were no adversary parties; no witnesses were examined; if there was any evidence taken no one knows about it. There was nothing before the Secretary of the Interior when he approved that portion of the roll containing his name. In no sense could the enrollment be considered *res judicata* of his right to be enrolled or of the fact that he was living on April 1, 1899.

In *Iowa Land & Trust Company v. United States*, 217 Fed. 10 (known in Oklahoma as the *Hawkins* case), it was held that a finding by the Commission to the Five Civilized Tribes that a person was entitled to enrollment, and to an allotment of land, is not conclusive against the United States in a direct suit to cancel the patent. In that case, there was an application for enrollment, *and evidence was submitted in support of it*. The court held that the hearing before the Commission was purely *ex parte*; that neither the United States nor the Creek Nation was represented; that no issue was framed or tried; that

consequently there was no judgment which bound the Government in a suit to cancel the patent on the ground that the patentee was not living on April 1, 1899, and that the Government might show that the evidence submitted in support of the enrollment was false—precisely what the appellant offered to show in the case at bar. The trial court distinguished the *Hawkins* case from the case under discussion on the ground that in the *Hawkins* case fraud was alleged and proven, while in the case at bar there is no such allegation. There is no ground for this distinction. The acts for which a judgment may be impeached are those fraudulent acts extrinsic or collateral to the matter tried, and not intrinsic in the matter in which judgment was rendered.

—*U. S. v. Throckmorton*,
98 U. S. 68;
Story's Eq. Jur., 1579.

That is the only kind of fraud which a court of equity will recognize as affording relief against a judgment so procured. The fraud pleaded in the *Hawkins* case, which was a direct attack on the patents, was not extrinsic or collateral fraud, and indeed this was the very ground upon which the defendants in that case insisted that the court could not grant the relief prayed for in the bill. The court held, however, that the Government was entitled to its relief notwith-

standing, because in a suit of that character, such fraud did not have to be pleaded or proven, and that all that was necessary was to plead and prove that the person whose allotment was sought to be cancelled did not belong to the class entitled to an allotment in the Creek Nation, because he died prior to April 1, 1899. This is precisely the case at bar. Fraud, therefore, as a ground for equitable relief, was not in the *Hawkins* case at all. It was alleged there, in effect, that Chester Hawkins was fraudulently enrolled as a living person on April 1, 1899, when in fact he was dead on that date. The allegations of the bill in the case at bar are in effect that Barney Thlocco was erroneously enrolled as a living person on April 1, 1899, when in fact he was dead prior to that date. There is not a particle of difference in the effect of the allegations. In both cases there was fraud in the sense of a wrong done to the Creek Nation by reason of the enrollment of, and the allotment of land to, a person never entitled to that right. The allegations amount simply to saying that the evidence upon which the enrollment was made was false. In both cases the issues seem to us to be identical.

It cannot be possible that the motive of the person upon whose information the Commission relied in making the enrollment, determines the right of

the Government to the relief prayed for. One may give information unintentionally false, or he may unintentionally, but with a corrupt motive, state that which is really true. In *Coe v. Aiken*, 61 Fed. 31, Judge PUTNAM, in a case involving a decision by the Railroad Commissioners of New Hampshire, with reference to the location of lands as made by a railway company said:

“ There is no doubt in my mind that a court of equity may set aside the action of a tribunal of this character, either in whole or in part, if it is fraudulent in its nature or essence, or was fraudulently obtained. It may even go further, and, for the same reasons, set aside the judgment of a judicial tribunal. This is a fundamental principle of equity law. But it is not enough for that purpose that the parties who brought about the adjudication had a fraudulent or illegal intent. It must be shown that the tribunal itself proceeded fraudulently or in excess of its powers, or that it committed a gross mistake, or that the adjudication was obtained by fraudulent methods practiced upon or before the tribunal, as by false testimony. It is a well settled principle, that a just result, otherwise lawful, is not ordinarily affected by the fact that the parties who secured it entertained in their own breasts an illegal, fraudulent, or unauthorized intent or purpose. The law ordinarily judges of what was done by what was done, and not by the purposes of those who secured the result.”

If the information obtained by the Commission had been that Thlocco was dead on April 1, 1899, and he had been denied enrollment on that ground, but later, say in the month of May of the same year, had actually appeared in the flesh, would it be said that his right to have the "judgment" denying the enrollment set aside, depended on the motive of the person upon whose testimony or information such judgment was rendered? Clearly not. His physical presence at a later date is simply indisputable evidence that he was alive on April 1, 1899, and that, therefore, the Commission had erroneously and by mistake, denied him enrollment on the ground that he had died prior to that time. If then, proof that he was *alive* on that date, would be admissible to impeach a "judgment" that he was *dead*, why is not any competent evidence admissible to show that he was *dead* on that date, in order to impeach a "judgment" that he was *living*? It is enough that the testimony upon which he was enrolled was false (*Cornelius v. Kessell*, 126 U. S. 461), or that such enrollment was upon false suggestions (*Hughes v. United States*, 4 Wall. 232).

Conceding all that is claimed by the defendants with respect to the information or evidence which the Commission had before it on the question whether Barney Thlocco was living on April 1, 1899, it is not

even contended that there was such an adjudication on that question as is contemplated under the decisions. In their answer, the defendants allege :

“ And these defendants say that on the 1st day of April, 1899, the said Barney Thlocco was a Creek Indian by blood, and was entitled, under the Acts of Congress on this behalf, to be enrolled upon the Creek Roll of Indians, and was so enrolled by said Commission, created by an Act of Congress, in the discharge of their duties, and acting upon evidence satisfactory to them and sufficient in law and in fact to authorize said Commission in placing the name of said Barney Thlocco on said rolls.”

The position was here assumed, and such was the argument, and also the view of the court, that the enrollment itself, regardless of the nature of the proceedings upon which it was predicated, was a judgment, conclusive upon the Government, unless it showed, not that the evidence, if any, upon which the enrollment was made, was false, but that there was no evidence whatever before it, either true or false. That such was the view taken by the court is evidenced by his ruling, excluding the offer of the Government to prove that one of the defendants, The Black Panther Oil & Gas Company, had alleged in its separate answer to the Government's bill the following :

“ This defendant admits that there was no controversy or contest of any kind put on before said Commission with respect to the enrollment of said Barney Thlocco, or his right to be so enrolled and in this connection, this defendant avers that there was no ground for any controversy or contesting the right of said Barney Thlocco to receive an allotment, his enrollment not having been challenged in any manner.” (Tr., p. 116.)

In the mind of the court it was immaterial whether there was a formal inquiry or trial between adversary parties as to whether Barney Thlocco was living on April 1, 1899; it was wholly immaterial whether issue had been taken on that question, or whether an opportunity had been afforded the Creek authorities to dispute or inquire into the truth of whatever representations were made to the Commission. Such representations were admittedly made in *ex parte* proceedings, yet the Government is said to be bound by them because the Commission acted upon such representations. In other words, the proposition is, that the Government is not bound, if *no representations at all* were made to the Commission, but that if *any* statements were made, then the Government is bound, *no matter how false they may have been*. We may, of course, indulge in the presumption that the representations, if any there were, are *prima facie* true, but is the Government to be precluded

from rebutting that presumption by showing that such statements were false? The doctrine is wholly untenable. Nothing was adjudicated, because nothing was in issue. An adjudication certainly presupposes a controversy over the fact adjudicated.

The record clearly shows that there was no judicial determination that Barney Thlocco was living on April 1, 1899. The testimony of Edward Merrick, the clerk who prepared the schedule containing the name of Barney Thlocco and submitted it to Mr. Bixby, the chairman of the Commission, shows that the listing of Thlocco's name on May 24, 1901, was not an end of the determination of his right to enrollment, and that such listing did not preclude further investigation as to his status. Mr. Hopkins says that such listing was tentative. Mr. Hastain says that the names placed on the new cards on May 22, 23 and 24, and which included the name of Barney Thlocco, were placed on such cards without a determination as to whether they were living on April 1, 1899. Mr. Lieber testifies that if the Commission had known or determined that he was dead at the time they enrolled him, that fact would have been noted in ink as a permanent record in accordance with the practice of the Commission, and that the card made on May 24, 1901, does not indicate whether he was living or dead on April 1, 1899, nor

does it indicate that an investigation was ever made as to that fact. Mr. Bixby simply says that in preparing the schedules, he talked with the clerks and got whatever information they had, very often taking the judgment of such clerks if he had no personal knowledge. The Commission as a body, at no time acted in the premises. All the evidence shows that Barney Thlocco was listed tentatively for enrollment, on the theory that, not having been shown to be dead, he might still be living, and upon that presumption; that he was one of the great many so listed at that time, merely to satisfy the objections of the Creeks to the ratification of the agreement. If Barney Thlocco was judicially determined to be alive on April 1, 1899, when was such fact determined? Clearly not at the time of the tentative enrollment; otherwise, why should it be tentative? There is no pretense whatever that it was done after that time.

The mere fact of enrollment affords no conclusive presumption that Barney Thlocco was living on April 1, 1899.

That Barney Thlocco was living on April 1, 1899, cannot be inferred from the fact of enrollment on the theory that such a finding, being necessary to support the enrollment, will be presumed. This was the contention in the case of *Moffat v. United States*,

112 U. S. 24, which was a suit to set aside a patent, and in which the court said:

“ It may be admitted, as stated by counsel, that if, upon any state of facts, the patent might have been lawfully issued, the court will presume, as against collateral attack, that the fact existed; but that presumption has no place in a suit by the United States assailing the patent and seeking its cancellation for fraud in the conduct of those officers.”

This language from the *Moffat* case was quoted in *United States v. Minor, supra*, and it was there stated that the principle is equally applicable when the officers of the Land Department have been imposed upon by the party to whom the patent was issued. In other words, whether the officers of the Land Department were themselves wholly innocent or guilty of misconduct, the question always was whether the patentee was lawfully entitled to receive the patent. No matter how the patent came to be issued if its issuance was unlawful, it worked a fraud on the Government, and therefore, though unassailable collaterally, the Government could always bring a suit to set it aside, unless the patent was issued upon a judgment or as a consequence of judicial proceedings. In *United States v. Minor, supra*, the lower court dismissed the bill of the United States on demurrer on the theory that the allowance by the

land officers of the pre-emption claim and the issuance of said patent were conclusive as against the United States. The Supreme Court reversed the ruling of the lower court and said:

“ The learned judge whose opinion prevailed in the Circuit Court and is found in the record, has been misled by confounding the present case with that of *United States v. Throckmorton*, 98 U. S. 61, and *Vance v. Burbank*, 101 U. S. 514, and thus applying principles to this case which do not belong to it.

“ In *Throckmorton's* case, it is true, a part of the relief sought was to set aside a patent for land issued by the United States. But the patent was issued on the confirmation of a Mexican grant after proceedings prescribed by the Act of Congress on that subject. These proceedings were judicial. They were commenced before a board of commissioners. There were pleadings and parties, and the claimant was plaintiff and the United States was defendant. Both parties were represented by counsel, the United States having in all such cases her regular District Attorney to represent her. Witnesses were examined in the usual way, by depositions, subject to cross examinations, and not by *ex parte* affidavits. From this tribunal there was a right of appeal to the District Court, and from that court to the Supreme Court of the United States by either party. There was nothing wanting to make such a proceeding, in the highest sense, a judicial one, and to give to its final judgment or decree all the respect, the verity, the conclusive-

ness, which belong to such a final decree between the parties. The patent could only issue on this final decree of confirmation of the Spanish or Mexican grant, and was, in effect, but the execution of that decree. It was to such a case as this that the ruling in *Throckmorton's* case was applied."

Clearly the trial court in this case fell into a similar error, and failed to distinguish between proceedings which are *ex parte* and those which are adversary and result in a binding judgment conclusive in its character and effect, and it was therefore error to exclude the evidence offered by the Government.

II.

The only adjudication of the issue as to whether Barney Thlocco was living on April 1, 1899, was adverse to the contention of the defendants. The Commission to the Five Civilized Tribes and the Secretary of the Interior determined, after a formal inquiry and hearing, that he died prior to that date and ordered the cancellation of his enrollment, which order was in fact carried out, and his name stricken from the roll of Creek citizens on December 13th, 1906, and it was error to exclude the evidence offered by the Government to prove such adjudication and cancellation of the enrollment.

The Secretary had supervision and control of the enrollment of citizens with power to correct and revise the same up to March 4, 1907.

The defendants at first claimed that having once placed the name of Barney Thlocco on the rolls, the Secretary of the Interior had no power to withdraw his approval of such enrollment. As an abstract proposition, this is not true, as was held in *Lowe v. Fisher*, 223 U. S. 107. The same contention was there made, but the court held that up to March 4, 1907, under the power given to the Secretary of the Interior, by congressional legislation, he had authority to withdraw his approval of an enrollment. The *Lowe* case was an application for mandamus by several Cherokee negroes who had been enrolled as freedmen. The Secretary afterwards found that they were not entitled to enrollment under the provisions of the Acts of Congress, and were therefore enrolled without authority of law. Conceding this power, however, the defendants insist that the attempted cancellation of the enrollment was a nullity because made without notice. Such is not the holding of the courts. The fact that no notice was given does not render the action of the Secretary void.

—*Acers v. Snyder*,
8 Okla. 662;

Sorels v. Jones,
110 Pac. 743;

American Mortgage Co. v. Hopper,
12 C. C. A. 294;
Guaranty Savings Bank Co. v. Bladow,
44 L. ed. 542.

In the case last cited, a public land entry was cancelled by the Secretary of the Interior after the entryman had given a mortgage on the land. The entryman had notice of the hearing upon which the cancellation was ordered, but his mortgagee had had no such notice. It was held by the court in a suit by the mortgagee to enforce its mortgage, that the cancellation of the entry without notice to it, was not a nullity, but had the effect of destroying the right of the mortgagee to use the certificate of entry as *prima facie* evidence of the entryman's claim. In the *Hopper* case, the entry of one Waddell was cancelled as fraudulent without notice to him. The court held that he was entitled to have his day in court and an opportunity to be heard, and that such opportunity was given him and his grantees in the suit by the American Mortgage Company, but that he made no attempt in that suit to show that the entry was not fraudulent.

The question before the court in the case at bar was whether Barney Thlocco was enrolled without authority of law because he was not living on April 1, 1899. The Commission to the Five Civilized Tribes

and the Secretary had found that he was not living on that date, and cancelled his enrollment for that reason. The fact that it was done without notice did not affect the jurisdiction of the Secretary over the subject matter, nor render his action a nullity, which the defendants could ignore. If the defendants had any rights which were affected by the action of the Secretary, they had the right to their day in court and an opportunity to be heard. That opportunity was given them in this case to show precisely what they might have shown in a hearing before the Secretary after notice to them, that is, whether Barney Thlocco was living on April 1, 1899, the only difference, as we see it, being that the burden of proof was upon them in this case instead of upon the Government, after the Government had proven the cancellation of the enrollment. To state the proposition more definitely, our contention is, that in a hearing before the Secretary, the defendants would have been entitled to rely on the presumption which the enrollment afforded as *prima facie* evidence of the fact that Barney Thlocco was living on April 1, 1899, and therefore entitled to enrollment, and the burden was on those asserting that he was not living on that date. The cancellation of the enrollment, not being void, but voidable only, as to any persons whose rights it might affect, would raise a similar presumption that Barney Thlocco was *not* entitled to enroll-

ment, and the burden was on the defendants to show that Barney *was* so entitled, notwithstanding the action of the Secretary of the Interior. In other words, the cancellation destroyed the right of the defendants to use the enrollment as *prima facie* evidence of the fact that Barney Thlocco was living on April 1, 1899. It was upon this theory, and which is supported by the cases above cited, that the Government offered as its first proof, that part of the Creek Roll showing the elimination of Thlocco's name therefrom by direction of the Secretary of the Interior on December 13, 1906. Upon its being excluded by the court, the Government offered to prove the proceedings of the Dawes Commission instituted on August 25, 1904, which embodied the record of a formal inquiry as to whether Barney Thlocco was in fact living on April 1, 1899, the evidence submitted upon that issue, the finding of the Commission that he died prior to April 1, 1899, the judgment upon such finding, the approval of such finding and judgment by the Secretary of the Interior, and the cancellation of the enrollment as a consequence thereof. If the position of the Government is sound, such evidence was competent and should have been admitted.

This view is not opposed to the rule announced in *Garfield v. Goldsby*, 211 U. S. 254. In that case,

Goldsby was a living person, duly enrolled as a Chickasaw citizen, and had selected, and received a certificate for his allotment of land, which certificate, under the Choctaw-Chickasaw Agreement, was conclusive evidence of his right to the land therein described. Without notice to him the Secretary struck his name from the rolls. It was held that under the circumstances, the right of Goldsby to be heard before his property could be taken away was of the essence of due process of law. But under the circumstances in the case at bar, as we shall hereafter see, no property rights had vested, when the Secretary cancelled the enrollment, and there was no one entitled to notice. *Turner v. Fisher*, 222 U. S. 204, was the same kind of a case as the *Goldsby* case, namely, a mandamus proceeding to restore the name of the relators to the rolls. In the *Turner* case, the the answer of the Secretary set up that the relators were not citizens of the Creek Nation and that their enrollment was obtained by fraud. To this answer, the relators demurred, and standing upon their demurrer, the writ was denied and the action of the Secretary in striking from the roll their names, was allowed to stand, which is certainly inconsistent with the theory that such action was a nullity.

The Act of April 26, 1906, did not affect the right of the Secretary to withdraw his approval of the enrollment of Barney Thlocco.

The court, however, in response to a question by counsel, based his exclusion of the above offer made by the Government, not upon the ground of want of notice, but upon the ground that title had passed by the issuance of the patents under the Act of April 26, 1906, and that the Secretary of the Interior was, therefore without jurisdiction on December 13, 1906, to withdraw his approval of the Thlocco enrollment. (Tr., P. 42.)

In this view we find it impossible to concur, for the following reasons :

- (a) The allotment was arbitrarily made by the Commission, no person ever having appeared to select the land in allotment.
- (b) At the time of this arbitrary selection, Barney Thlocco was admittedly dead, and even if he had been lawfully enrolled, all right to the tribal property died with him.
- (c) Neither the allotment certificate nor the patents were ever delivered or accepted, an act which was necessary before the investiture of individual rights to the land.

(d) The certificate of allotment and the patents therefor were issued to a dead man, and were therefore void.

(A)

Section 3 of the Original Creek Agreement provides:

“ All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said Commission so as to give to each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values, and any allottee receiving lands of less than such standard value may, at any time, select other lands which, at their appraised value, are sufficient to make his allotment equal in value to the standard so fixed.”

Section 4 provides:

“ Allotment for any minor may be selected by his father, mother or guardian, in the order named, and shall not be sold during his minor-

ity. All guardians or curators appointed for minors and incompetents shall be citizens.

“ Allotments may be selected for prisoners, convicts and aged and infirm persons by their duly appointed agents, and for incompetents by guardians, curators or suitable persons akin to them, but it shall be the duty of said Commission to see that such selections are made for the best interests of such parties.”

Section 5 provides :

“ If any citizen have in his possession, in actual cultivation, lands in excess of what he and his wife and minor children are entitled to take, he shall, within ninety days after the ratification of this agreement, select therefrom allotments for himself and family aforesaid, and if he have lawful improvements upon such excess he may dispose of the same to any other citizen, who may thereupon select lands so as to include such improvements; but, after the expiration of ninety days from the ratification of this agreement, any citizen may take any lands not already selected by another; but if lands so taken be in actual cultivation, having thereon improvements belonging to another citizen, such improvements shall be valued by the appraisement committee, and the amount paid to the owner thereof by the allottee, and the same shall be a lien upon the rents and profits of the land until paid: *Provided*, That the owner of improvements may remove the same if he desires.”

Section 7 provides:

“ Each citizen shall select from his allotment forty acres of land as a homestead, which shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above: *Provided*, That selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who can not select for themselves, may be made in the manner herein provided for the selection of their allotments; and if, for any reason, such selection be not made for any citizen, it shall be the duty of said Commission to make selection for him.”

On page 82 of the Sixth Annual Report of the Commission to the Five Civilized Tribes, it is said, in speaking of the provisions of the Act of June 28, 1898, known as the Curtis Bill:

“ In order, therefore, to give effect to the provisions of said act according to its design, and to enable every member of each tribe to select and have set apart to him lands to be allotted to him in amount approximating his share as aforesaid, the Commission to the Five Civilized Tribes is instructed, as a means preparatory to and in aid of the duty of allotment of the lands of said tribes required of it by said act, to proceed as early as practicable to establish an office within

the territory of each tribe, provided with proper and suitable records, including a copy of the United States survey of the lands of the tribe, for the purpose of registering each and every selection of lands made by any member of the tribe for his allotment; and in order to make such selection of lands by any member of the tribe effective and valid such member, or the head of each family shall be required to appear in person at the office within his tribe and to make application to one of the members of said Commission or to some one by said Commission authorized to act for it in performing such duty, to have set apart to him the lands selected by him for himself and wife and minor children; and such application shall be prepared by some member of said Commission, or the person so authorized, and the applicant, shall be required to therein make oath that he has, in person actually been upon the lands so selected by him, and is fully informed as to the location of the same and the character of the soil; that the land is suitable for a home for himself and family; that he has in good faith selected such lands, and will accept same in allotment to himself and family; that no part of same is lawfully held by any other member of the tribe; and thereafter he may occupy, control and rent the same for any period not exceeding one year by any one contract until lands are in fact allotted to him under the terms of said act, and will be protected therein by the Government, from interference by all other persons whomsoever. Selections may be made

for orphans, incompetents, and prisoners, by guardians and relatives.

“ Any selection of lands otherwise made by any member of any tribe, and any rent contract made for any longer period than one year, or for other than the current year, shall be void.”

So far as we know, these rules have never been altered or repealed.

There is nothing in the provisions of the Creek treaty above quoted which abrogates, but the same are entirely consistent with, the rules of the Secretary relative to the selection of allotments, except that in section 7, the Commission is given authority to *arbitrarily select* a homestead for a certain class of persons, to-wit: “minors, prisoners, convicts, incompetents, and aged and infirm persons, who cannot select for themselves.” Under the rule that the inclusion of one thing is the exclusion of another, the provisions of section 7 would appear to be the full extent of the Commission's authority to make arbitrary allotments.

(B)

The defendants admit that Barney Thlocco was dead at the time the certificate and patents were issued, and this being true, even if he was originally entitled to enrollment, all right to the tribal property

died with him. In other words, no right to the land in controversy ever vested in him or his heirs.

Section 28 of the Original Creek Agreement provides:

“ No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.

“ All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled ‘An Act for the protection of the people of the Indian Territory, and for other purposes,’ shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.”

It has been consistently held that the inception of title is the actual selection of the allotment.

—*Brann v. Bell*,
192 Fed. 427;

McKee v. Henry,
201 Fed. 74;

Hooks v. Kennard,
28 Okla. 457.

In *Sizemore v. Brady*, 235 U. S. 441, it was contended that the Original Creek Agreement, relating to the allotment and distribution of the tribal lands and funds, was in the nature of a grant *in praesenti* and invested every living member of the tribe and the heirs of every member who had died after April 1, 1899, with an absolute right to an allotment of lands. As to this contention, the court said:

“ To this we cannot assent. There was nothing in the agreement indicative of a purpose to make a grant *in praesenti*. On the contrary, it contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them.”

(C)

The evidence in this case shows that the patents never were delivered, but are still in the possession of the officers of the Government. The delivery and acceptance of a patent are essential to pass the title.

Section 23 of the Original Creek Agreement provides:

“ Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment.

“ * * * Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds of lands reserved from allotment.

“ The acceptance of deeds of minors and incompetents, by persons authorized to select their allotments for them, shall be deemed sufficient to bind such minors and incompetents to allotment and conveyance of all other lands of the tribe, as provided herein.”

On page 193 of the Report of the Commission to the Five Civilized Tribes for the fiscal year ending June 30, 1904, is contained the decision of the Creek

Allotment Contest of *Lobay Major v. Lou Thompson*, and in which it was said, by the Secretary of the Interior:

“ The acceptance of the deed (allotment patent) has the effect of the execution and delivery of a deed of release of the allottee's interest in other communal lands allotted to others of the tribe, like the voluntary deed in partition of one of several common owners. This makes acceptance of the deed a part of the transaction of partition or allotment of the communal property in severalty to the individual members of the communal owners.”

The Atoka Agreement, which is part of the Curtis Act, had the same provisions with reference to the acceptance of patents, and in *Choate v. Trapp*, 224 U. S. 665, it was held that after delivery and acceptance of the patents, the Indian became vested with the title, impliedly, at least, recognizing the necessity of such acceptance. Section 5 of the Act of April 26, 1906, provides:

“ That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee, shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall

descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior, to the party entitled to receive the same: *Provided*, The provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this act."

These very provisions of the act are a recognition by Congress that prior to that time, the mere issuance and the filing in the office of the Commission of a patent, did not pass the title, but that delivery and acceptance of the same were necessary to have that effect; otherwise, what was the necessity for such legislation? The court below, however, was of the opinion that these provisions related back to the issuance of the patents to Thlocco, and operated to vest the title in his heirs as of the date of the patents. But the act is not susceptible of that construction. It refers only to patents *hereafter* issued. There is nothing in the act from which it can be ar-

rived that retrospective operation was intended. The rule in this respect is laid down in Sutherland on Statutory Construction, paragraph 642:

“ The rule is that statutes are prospective, and will not be construed to have a retroactive operation unless the language employed in the enactment is so clear that it will admit of no other construction.”

To give the act retroactive operation would be to divest the Secretary of the Interior of the very power which the same act in terms recognizes, to-wit: the right and jurisdiction up to March 4, 1907, to revise and correct the rolls. If he could not exercise that right in the case at bar, it would only be because rights had vested in the allottee in consequence of the enrollment before the passage of the act. The act created no new rights. It operated only on equitable titles vested prior to its passage, and for the purpose of perfecting the legal title. No equitable title to the lands in controversy ever vested in Barney Thlocco, for even if living on April 1, 1899, he died before an allotment was selected. The act indeed contemplated such a case as we have here. The work of the Dawes Commission in allotting the lands to those who had been enrolled was necessarily proceeded with on the assumption that every person on the rolls was entitled to an allotment. Practically

all the Creek lands had been allotted long before the passage of the Act of April 26, 1906. At the time of the passage of that act, the Secretary had under investigation just such a case as Congress must have had in mind. To say that the provisions of that act ended his power to correct the roll would be to make the act destroy itself. It is not contended, and could not successfully be contended that the right to the land in this case vested in any one prior to the act. In whom did such rights afterwards vest, simply by operation of its provisions? Not in the heirs of Thlocco; they had done nothing; no allotment had been made to them and no application was made by them for such allotment. They were asserting no claim to the land. The appellant, although that burden was not upon it, offered to show in the court below that the lands were unoccupied public domain long after the cancellation of the Thlocco enrollment; this offer was excluded. The grantees, or lessees, of the heirs, could of course take nothing, and never claimed anything. Yet, we are told in effect, that in spite of themselves, the law forced upon the heirs a title to the land in controversy, which immediately became paramount to any rights of the Creek Nation and to the right of the Secretary to correct the erroneous enrollment. This cannot be the law.

The so-called *Hawkins* case settles this point. Speaking of the provision of section 5 above quoted, it was there said:

“ These laws have no application where there is no allottee. The language used in section 5 assumes that there is in existence a legal allottee and provides for the contingency of the death of the allottee before the patent becomes effective. This law provides that if the death of the allottee occurs before the patent becomes effective, the land shall inure to and vest in his heirs. Section 32 is to the same effect. It assumes that deeds have been issued to a legal allottee, who has died before the approval of the deed. Neither section deals with the case where there never was an allottee in existence.”

(D)

As the allotment of the land in controversy was made to, and the patents issued in the name of, a dead man, the same is void.

It has often been decided that a deed or patent to a dead man conveys nothing, and is a nullity.

—*Moffatt v. United States*,
112 U. S. 24;

McLeod v. United States,
187 Fed. 281;

Colorado Coal & Iron Co. v. United States,
123 U. S. 203;

McDonald v. Smalley,
6 Pet. 261;

Galt v. Galloway,
4 Pet. 332;

Moreham v. Phelps,
21 How. 294;

*Iowa Land & Trust Company v. United
States*,
217 Fed. 10.

In the case last cited, a certificate of allotment and the patent for the land so selected in allotment were issued to Chester Hawkins, in his name. Chester Hawkins, at the time the allotment was made and the patents issued, had been dead for several years, and in fact had died prior to April 1, 1899, and was not entitled to an allotment. The court held that for the purpose of receiving an allotment of land, he was a mere myth, and that the patents so issued to him, and not to his heirs, was a nullity and passed no title. So we say in this case that Barney Thlocco got nothing by virtue of the patents issued to him, and therefore his heirs took nothing. They had no rights which could be affected by the action of the Secretary in striking their ancestor's name from the rolls. They were not claiming as allottees in their own right; up to the time the Secretary cancelled the enrollment of Barney Thlocco, they had made no claim to the land in controversy, had never taken

possession of it, and were exercising no rights of ownership over it whatever.

We do not think that the case of *Skelton v. Dill*, 235 U. S. 206, is authority to the contrary. In that case, the facts were that one Archie Hamby was born in February, 1900, and died in July, 1901, being survived by his parents and one sister. His mother was a Creek and his father a white man. Two or three years after the child's death, he was enrolled by the Dawes Commission, and the lands in question in that case were allotted in his name. Patents to the lands were also issued in his name, and it was said in the opinion that such patents, by operation of law, vested the title in his heirs. Whether the patents in that case did, by operation of law, vest the title in the heirs of Archie Hamby, was not put in issue. Each of the parties claimed under the same grantors, and the case was tried upon the assumption that title had passed. In any case, if the court intended to pass directly on the question, its statement that the patent, by operation of law, vested the title in the heirs of the patentees, doubtless rests upon the following provisions of the Act of Congress, approved June 25, 1910, which is very much broader than the Act of April 26, 1906:

“ Where deeds to tribal lands in the Five Civilized Tribes have been, or may be, issued in

pursuance of any tribal agreement, or any Act of Congress, to a person who has died or who hereafter dies, before the approval of such deed, the title to the land designated therein shall inure to and become vested in the heirs, devisees or assigns of said deceased grantee, as if the deed had been issued to the deceased grantee during life.”

But as the Secretary of the Interior withdrew his approval of the enrollment of Barney Thlocco before the passage of the Act of June 25, 1910, such act would have no application to this case.

III.

The testimony submitted by the Government showed that there was no proof before the Dawes Commission amounting to legal and substantial evidence that Barney Thlocco was living on April 1, 1899, and his enrollment upon such proof is an error of law for which the allotment may be cancelled.

If we assume that the Commission found specifically that Barney Thlocco was living on April 1, 1899, or that the fact of enrollment was in itself a finding and determination of that fact, then we insist that there was no evidence before the Commission, sufficient as against direct attack by the Government to cancel the patent, to justify his enroll-

ment. We think that this is clear from what has already been said on this subject. The court in its oral opinion at page 111 of the transcript, calls attention to the testimony of the witness, Merrick, who said that in copying data from the old census card to the new census card, he changed the post-office and also the age of Barney Thlocco, and that because of this discrepancy, it was the *opinion* of the witness that he must have had "some information" about Thlocco in addition to that furnished by the cards themselves. This is a mere inference and conclusion of the witness; but suppose he had "some information," such information does not refer to the crucial question in the case, that is to say, whether Barney Thlocco was living on April 1, 1899, but is quite consistent with the theory on which the Commission evidently listed his name, tentatively, to-wit, that he was then a living person, there being no proof that he was dead. That he was enrolled as a living person is further evidenced by the fact that the allotment was made and certificate and patents for the same were issued in his name and not to his heirs. *If he was not enrolled as a living person on May 24, then he was enrolled without proof, and without any knowledge on the part of the Commission, as to whether he was living or dead. If the Commission had determined he was dead, a record of that fact would have been made in accordance with the usual*

practice of the Commission as testified to by the witnesses. This record would have been in the form of an affidavit of death or by a notation on the card in ink as a permanent record. Neither of these things were done. The truth is, and it is perfectly evident from the whole record, that the Commission knew nothing about Barney Thlocco on May 24, 1901, except that his name was on the tribal roll and that he was alive as late as 1898; that he was listed tentatively to save any possible rights which he might have had to enrollment, in order to satisfy the Creek Tribal Council and secure its ratification of the agreement, and that such listing of Barney Thlocco's name was subject to further investigation as to whether he was living or dead, and as to the date of his death. The Government offered to prove that the Commission instituted such an investigation of his right to enrollment and upon such inquiry determined what they could have discovered in May, 1901, had there been a hearing on the matter then, that Barney Thlocco was *not* living on April 1, 1899. This offer and the ruling of the court thereon excluding it, is one of the assignments of error. This evidence was competent, not only for the purpose of supporting the allegations of the bill that Barney Thlocco was not living on April 1, 1899, but the very fact that the Dawes Commission did conduct such investigation to determine whether Barney Thlocco was living on April

1, 1899, is persuasive evidence that they had never adjudicated that question prior to such investigation.

In order that this court may see just what was in the mind of the learned judge below on this question, we call attention to his oral opinion, announced on the argument of an objection to certain evidence, and found on pages 111-13 of the transcript. The court had announced orally on the trial that it would be necessary for the Government to make out a *prima facie* case that the Commission to the Five Civilized Tribes enrolled Barney Thlocco without any evidence, and with reference thereto, the court said:

“ Has the Government made a *prima facie* case on that point? That is, has it by clear and convincing proof shown to the court that the Commission acted in enrolling Thlocco without any evidence whatever? If the proof on the other hand, clearly convinces the court that it did have evidence, or if the proof is such as to leave the court's mind in a state of doubt as to whether there was evidence or not, in my judgment, the Government has failed to establish that *prima facie* case. I have examined, as I say, the evidence of all these witnesses, Mr. Merrick, Mr. Hastain, Mr. Hopkins, Mr. Bixby and Mr. Lieber in particular. Mr. Merrick's testimony in view of the fact that he himself made the card, probably affords the court the most direct light on the controversy. A very significant feature

of the case as developed by Mr. Merrick's testimony, and as developed by a comparison of the census card as made by him on May 24, with the old census card is this: That whereas the evidence differs that in other instances, a greater or less number of instances, the census cards which were made on that date, and on the prior days in May, were made from the tribal rolls and the census card, in this case it clearly develops that the census card which Mr. Merrick made must have been made on evidence outside of and in addition to the rolls and the old census card, for the reason that the age of Barney Thlocco and his post-office address is given as different from that which appeared on the census card. It follows, therefore, that as to those particular statements, there must have been before Mr. Merrick evidence in addition to that contained in the documents to which I have referred. It doesn't follow as a matter of positive conclusion that that evidence affected the question as to whether Barney Thlocco was living or dead on April 1, 1899, but it does show that Mr. Merrick, in the case of that card, didn't just follow the rolls and the old census card, and take no evidence whatever. There must have been before Mr. Merrick some investigation outside of those documentary features. The evidence is clear here that at the time these cards were made up, Barney Thlocco's as well as the others, the Commission with its large force was there securing as far as it could evidence sufficient to enable it to complete these census cards which were to become the basis of the schedules which

would finally be forwarded to the Secretary for his approval, and make up the roll. There was the tribal council in session and the Town Kings were there. The evidence clearly shows that they had access to the Town Kings; that they had parties out bringing in evidence. That the evidence in enrolling the Creeks, was largely, almost entirely, except in contest cases, oral, and not made a matter of record, so that unfortunately we have not now here any record to show what was before the Commission, but in view of that fact and in view of the evidence here, the court can't say as a fact—can't find as a fact that there was no evidence before the Commission on that day, or that there was no evidence at some subsequent time pursuant to investigation which the Commission made, and made before the schedule was made up and forwarded to the Secretary, can't find as a fact from the evidence in this case, in my judgment, that there was no such evidence. There has been offered in evidence here and permitted to become a part of the record, the proceedings of October 16, 1903, which appears to have been in the course of an examination with regard to certain unaccounted for Creeks, a great number of them. It appears that when the Town King was being examined, that he was questioned with regard to Barney Thlocco's name on the roll, and he speaks of him as Barney Thlocco on the 1890 roll. As Barney on the 1895 roll. He is asked with regard to his death in relation to the burning of a certain hospital, or house of some character. There is evidence that that is a circum-

stance to show that that was the investigation, and the only investigation, which the Commission ever made with regard to the question of Barney Thlocco's existence on April 1, 1899. That was permitted as a circumstance, but when considered in connection with the evidence of Mr. Merrick, Mr. Hastain, Mr. Bixby and Mr. Hopkins with regard to the manner in which this enrollment was handled, the statement of these gentlemen, offered by the Government, their positive statements that there must have been evidence with regard to Barney Thlocco's existence April 1, 1899, or his name would not have been forwarded for enrollment, in view of those statements, the court cannot find that this evidence clearly and convincingly establishes the fact that there was no evidence prior to the time the schedule was forwarded. If that is true, as I view the province of this Commission, it was made an agency of the Government to determine the question of Barney Thlocco's right to enrollment, and when that question was determined, and the questions of fact determined by the Commission necessary to establish his right to enrollment, those questions of fact, when the enrollment is approved by the Secretary of the Interior, stand as determined for all time in all courts, until they are attacked as having been based upon fraudulent testimony or having been arbitrarily found without any testimony."

It is clear, we think, that the court was governed in his ruling, not by the positive evidence of any facts

submitted as to whether Barney Thlocco was living on April 1, 1899, but by inference and conclusions drawn by the witnesses as to what evidence *might* have been before the enrolling party because of the acts done, particularly the conclusions of the witnesses Merrick and Tams Bixby, who was chairman of the Commission, and who testified that he never enrolled any person without evidence. But after all, this simply amounts to saying that Barney Thlocco will be presumed to have been living on April 1, 1899, because that will be implied from the fact of his enrollment. In other words, because his enrollment will be presumed to be lawful rather than unlawful, the fact that he was living on April 1, 1899, will also be presumed, because that was a necessary prerequisite. Such conclusion, as we have stated before, might be true in a collateral proceeding, but to hold the ruling applicable in a direct suit by the Government to cancel the patent, is to say that the presumption cannot be rebutted, and therefore, that no evidence at all, no matter how clear and convincing, was competent or admissible to show that Barney Thlocco was not living April 1, 1899.

We submit also that the court was mistaken in its application of the rule announced in the adjudicated cases, particularly the *Maxwell Land Grant* case, 121 U. S. 325, where it was said:

“ We take the general doctrine to be that when in a court of equity, it is proposed to set aside, to annul or to correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which this is done, must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.”

The application to this case of the rule requiring clear and convincing evidence upon which the patent to Thlocco may be set aside, requires only that the Government should prove by that character of evidence that Barney Thlocco was not living on April 1, 1899, and not that there was no evidence before the Commission that he was living on that date. If there was any burden on the Government to prove its case by negative evidence of that character, such burden was discharged when it was shown that there was no hearing, inquiry, issue nor finding on the fact.

The rule in the *Maxwell* case was invoked and applied in *McLeod v. United States*, 187 U. S. 261, and in *Colorado Coal & Iron Company v. United States*, 123 U. S. 307. The last case was one in which the Government filed its bill to cancel a patent to public lands on the ground that the patentees were fictitious persons. The defendant pleaded that he was a purchaser in good faith, but the Circuit Court

held that the patentees were fictitious and that no title whatever passed. On appeal to the Supreme Court, the inquiry was whether the Circuit Court was right in holding that the patentees were fictitious persons, and this was the sole question examined by the court. This court, with the rule in the *Maxwell* case before it, reviewed the whole evidence upon the question as to whether the patentees were fictitious, and found that such evidence was not clear, unequivocal and convincing *on that question*, saying that it did not necessarily follow that no such persons in fact existed as a necessary conclusion from the testimony of the witnesses that they *knew* no such person.

“Manifestly,” as was said in *McLeod v. United States, supra*, in analyzing the *Colorado Company* case :

“Had the evidence in the case before the Supreme Court, been clear, unequivocal and convincing, to the effect that the grantees named in the patent did not in fact exist, but were fictitious persons, the court would have held with the Circuit Court that the legal title to the lands in question did not pass from the United States by virtue of the patents, because there was, in fact, no grantees.”

If the Government, in the case at bar, had been permitted to introduce its evidence, on the question of

whether Barney Thlocco was living or dead on April 1, 1899, and had satisfied the court, by clear, unequivocal and convincing evidence, that he was not living on that date, the effect would have been to establish the falsity of whatever information the Commission had before it in the enrollment of Barney Thlocco. Frankly, we do not understand upon what principle the Government should have been required to prove by "clear and convincing evidence" that there was no evidence before the Commission that Barney Thlocco was living on April 1, 1899, and then be required to prove by the same character of evidence, that he was dead on that date.

The rule in any case is not applicable to the facts in this case. It has never been applied, that we know of, except in cases involving the rights of third persons, claiming under the patentee and defending as bona fide purchasers without notice. Such were the cases cited above. Necessarily, the rule could not apply to the patentee himself, and to whom a patent has been made for lands to which he never had any right, either legal or equitable, regardless of the question whether he himself, or the officers of the Government, were responsible for the issuance of the patent. In neither case could he plead that he acquired a vested right under a wrongful act. Neither could the rule apply to the heirs of such persons, who,

of course, took no greater interest than their ancestor. As the defendants in the case at bar made no claim to be bona fide purchasers and do not base their defense on such claim, we think the court was clearly in error in ruling that the Government must first show by clear and convincing proof that the Dawes Commission had no proof before it that Barney Thlocco was living on April 1, 1899, before it could be permitted to show affirmatively that he was in fact dead on that date.

We insist that whatever information the Commission had before it in enrolling Barney Thlocco, the record shows that it was not legal or substantial evidence on the question as to whether Thlocco was living on April 1, 1899. To render judgment on such evidence adverse to the interests of the Creek Nation and of the Government, would be an error of law for which the patent would be cancelled. *United States v. Dibbell*, 227 Fed. 160, was a suit by the United States to cancel a patent to a Sioux Indian for land allotted to him and held in trust by the United States, without power of alienation. The patent had been issued under the provisions of an act giving the Secretary of the Interior power to so do whenever he was satisfied that the allottee was capable of managing his own affairs. The patent was issued by the Secretary upon the statement of the Indian

Agent that the allottee was "worthy to be entrusted with the patent in fee simple and I therefore recommend that his request be granted." It was held that this was not sufficient representation as to the Indian's competency to manage his own affairs; that there was no substantial evidence of that fact before the Secretary, and that his adjudication of the fact, without substantial evidence to sustain it, was an error of law which vested in the United States a cause of action in equity, to avoid the patent upon that adjudication. We respectfully submit, therefore, that conceding everything that the defendants claim for it, there was no substantial evidence before the Commission on the question whether Barney Thlocco was living on April 1, 1899, when it enrolled him as a living person on that date, and that the determination of that fact upon such vague and indefinite information as it might have had before it, as shown by the record, was an error of law for which the allotment may be cancelled.

In this case, the enrollment was not complete until approved by the Secretary of the Interior. The Secretary had in fact approved the enrollment of Barney Thlocco, but in view of the fact that he had nothing before him except the usual letter which accompanied the schedules, how can it be said that his act in approving the enrollment was judicial or *quasi*

judicial in its character? He had nothing before him upon which he could exercise such a judgment. He was not reviewing the action of the Dawes Commission. There was nothing to review. He was simply approving, in an administrative way, a purely administrative act.

C o n c l u s i o n s .

The duty of the Commission to the Five Civilized Tribes and of the Secretary of the Interior, under the various Acts of Congress, was to distribute the lands and property of the Creek Nation among those lawfully entitled thereto. That property consisted of lands and money. The allotment of the lands in severalty among the members of the tribe was a part only of its duty. Having decided that Barney Thlocco was not entitled to share in the property of the tribe, the Secretary struck his name from the rolls in order that, so far as he was able to do so, the trust imposed in him might be properly discharged, that is, so far as the remaining property and moneys of the tribe were concerned. But as a patent had been issued to Barney Thlocco, for an allotment of 160 acres of land, to which he was not lawfully entitled, the Secretary was unable to fully discharge the obligation of the Government, in that he was powerless to cancel the patent, this being a ju-

dicial act, even though the patent was void. (*Moran v. Horsky*, 178 U. S. 205.) Accordingly, a suit was instituted in the Circuit Court of the United States for the Eastern District against the unknown heirs of Barney Thlocco, for the purpose of cancelling the patent. A decree was entered in the case in accordance with the prayer of the bill, and afterwards this decree was vacated on the ground that the court had no jurisdiction to entertain a suit against unknown heirs, and on November 1, 1913, the Government dismissed such suit, and on the same day filed the bill in this case.

The theory of the present suit is that as the patents to Barney Thlocco were issued to a person not entitled to any lands in the Creek Nation, and in violation of the rules of the Creek people and of the Acts of Congress, the issuance of such patents impaired the ability of the Government to fulfill its obligations to distribute the property of the tribe among its members, and this suit was in fact to restore to the Department of the Interior that jurisdiction and right of which it had been deprived by reason of the erroneous issuance of patents to a person not entitled thereto.

—*Hughes v. United States*,
4 Wall. 232;

Germania Iron Co. v. United States,
165 U. S. 379.

The issuance of a patent attempting to convey lands belonging to the Creek Nation to a person not entitled thereto, is certainly ground for the interference of a court of equity, especially where no rights of innocent third parties have intervened or become vested in reliance upon the action of the Government. *Moffatt v. United States*, 112 U. S. 24. The *Moffatt* case was a case to cancel patents to fictitious persons. The sole contention of the Government in that case was that it is a jurisdictional requirement that a person seeking pre-emption should be the identical person in whose name the application was made, and that the Register and the Receiver have no more jurisdiction, when the proceedings are taken in a fictitious name, than the Ordinary has to grant letters testamentary or of administration of a living man. The court held that a fictitious person received public lands, and that there was no transfer of the property, and that no one, not even a subsequent purchaser in good faith, could derive any right from such conveyance. Fraud in that case was shown, that is, fraud in the sense of intentional wrongdoing, but fraud was necessary to prove the fact in issue, that is, whether the patents were issued to fictitious persons, or not. In the case at bar, it was not necessary to show fraud in that sense to prove that Barney Thlocco died prior to April 1, 1899. The Government contended that it should have been per-

mitted to prove the cancellation of the enrollment and that the defendants were bound to take notice of it, as affecting any title which they sought to acquire. The roll is a link in the chain of title. In the *Hawkins* case, it was argued that fraud was alleged, and that the court found there was fraud in securing the enrollment, yet its decision is not based on that fact, but on the fact that Hawkins was not entitled to enrollment because he died prior to April 1, 1899. Had the decision been based simply on the ground of fraud as a head of equity jurisdiction, the court could not have reached the conclusion that there were no bona fide purchasers, because of course, a purchaser without notice of fraud is protected. Regardless of the question of fraud, if for any cause, a patent is issued to a party not entitled thereto, the remedy is open in a court of equity to the wronged party, either by cancellation of the patent or by declaring the patentee to be a trustee of the true owner.

—*Stark v. Starr*,
6 Wall. 402;

Burnier v. Burnier,
147 U. S. 242.

In the case at bar, the lands were withdrawn from the Creek Nation and given to one who was not entitled to receive it. The defendants made no claim that they are bona fide purchasers, even if, under the

facts, such a defense would have been good. The equities are with the Government, as trustee for the Creek Nation. The defendants, as the heirs of Barney Thlocco and their grantees, certainly have no paramount equity in these lands. In *Cunningham v. Ashley*, 14 How. 377, Cunningham claimed the right to enter the land which was the subject of controversy. After many hearings, the Land Department decided that he had no right to do so and rejected his claim. The defendant was permitted to enter the land and receive patents from the Government. Justice McCLAIN, in delivering the opinion of the court, said that this final decision of the officers of the Land Department was the result of twenty years of controversy, but nevertheless, he held that the rights of Cunningham were paramount to those acquired by the entry of the defendants, and the judgment in their favor; that while the cause had been in contest and had received the consideration of the Receiver, the Register, the Commissioner of the Land Office, the Attorney General and the Secretary of the Interior, all of whom had concurred in rejecting Cunningham's claim, yet that the court would look into the equities of the case and set aside the acts of all these officers because they had erred, both as to the law and the fact, to the prejudice of the complainant.

We submit, therefore, with the utmost confidence, that the evidence offered by the Government to show that Barney Thlocco died prior to April 1, 1899, and that in fact such was the actual finding and the only judicial finding of the Commission which enrolled him, and also that the evidence offered by the Government to show that the approval of his enrollment was withdrawn by the Secretary of the Interior upon the finding of the Commission that he died prior to April 1, 1899, before any title to the allotment passed from the Creek Nation, should have been admitted, regardless of what proof to the contrary may have been in the possession of the Commission when it placed him on the roll, and that the exclusion of such evidence was based upon a theory not supported by the decisions and upon a wholly erroneous conception of the principles applicable to the case. Counsel for the defendants on the trial below did not produce a single authority to sustain their objection to such evidence. Surely the Government cannot be bound by a falsehood, or by proceedings to which neither it nor the Creek Nation was a party. There is no theory of the law and no principle of equity, with which we are familiar, under which the Government is estopped to show the truth as to the date of Thlocco's death.

From the record here presented it is established beyond question :

First, that whatever evidence was had when Barney Thlocco was enlisted for enrollment, was taken in *ex parte* proceedings, and which hardly amounted to even that ; that the Creek Nation was not represented at the time such evidence was taken and had no opportunity to dispute it or to inquire into its correctness ; that no record was made of any such evidence ; that such evidence, as the principal defendant admits, was in fact not disputed for the reason that there was no opportunity for an interested party to dispute it ; that there was in fact no hearing before the Dawes Commission as a body and sitting as a tribunal to hear and determine a definite controversy ; that there was no issue before the Commission on the question of the date of the death of Barney Thlocco prior to his enrollment, and consequently there could not have been a judicial finding on that question. The Government proposed to show, not merely by the testimony of 20 witnesses and documentary evidence, that the evidence, if there was any before the Commission, was necessarily false, but also proposed to show that the Commission itself never considered that it had made any such finding prior to his enrollment, but that upon subsequent investigation it found upon evidence submitted and

preserved, that he was dead on April 1, 1899, and that his enrollment was cancelled for that reason and as a result of such investigation.

Second, that no rights in the land had vested in the heirs of Barney Thlocco, or in their grantees or lessees, prior to the action of the Secretary in withdrawing his approval of the Thlocco enrollment; that no one was in possession of land or claiming it prior to the institution of this suit, except as to that part of it claimed by the intervenor, Johnathan Posey, and his lessees; that no injury, therefore, will be done by a decree cancelling the patents for the defendants do not claim or plead that they are bona fide purchasers, but stand squarely upon the proposition that the enrollment and the issuance of patents are conclusive of all the matters alleged in the bill, and are, therefore, immune from attack.

Third, that even upon the defendants' own theory that the Commission had adjudged Barney Thlocco to have been living on April 1, 1899, there was, as appears from the record, no legal or substantial evidence to support such judgment.

Respectfully submitted,

PRESTON C. WEST,

JAMES A. VEASEY,

*For Appellees, Chas. F. Bissitt, Toraway
Oil Co., F. L. Moore and J. S. Cosden.*

UNITED STATES *v.* WILDCAT, A MINOR, ET AL.

ON CERTIFICATE FROM AND CERTIORARI TO THE CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 741. Argued April 11, 12, 13, 1917.—Decided May 21, 1917.

Acting under the enrollment provisions of the Curtis Act of June 28, 1898, and the Creek Agreement of March 1, 1901, the Dawes Commission was a *quasi* judicial tribunal, and enrollments made by it and approved by the Secretary of the Interior are presumptively correct; and, unless impeached by very clear evidence of fraud, mistake or arbitrary action, they are conclusive.

Whether or not a person alleged to be a member of the Creek Nation was living on April 1, 1899, is one of the questions going to the right of such person or his heirs to have his name enrolled under § 28 of Agreement of March 1, 1901, which the Dawes Commission was competent to decide; it is not a jurisdictional question, and an incorrect determination of it does not necessarily render the enrollment void. *Scott v. McNeal*, 154 U. S. 34, distinguished.

In enrolling members of the Creek Tribe in 1901, the Dawes Commission was authorized to presume that a person enrolled as a member of the tribe on the tribal rolls of 1895 was living on April 1, 1899, in the absence of proof of his death before that day or of circumstances indicating that he had died before the commission acted.

The evidence in the case examined and found wanting in proof of such arbitrary action on the part of the Dawes Commission as would establish a mistake of law or fact warranting the impeachment of its action in enrolling the Indian in whose name the allotment in question was made and patented.

An attempt of the Secretary of the Interior to set aside the enrollment and allotment of a deceased Creek Indian by striking his name from the rolls without notice to his heirs is *ultra vires* and void.

When a Creek citizen dies after April 1, 1899, and an allotment is afterwards made, and deeds issued, in his name, the title is vested in his heirs by § 28 of the Agreement of March 1, 1901. *Skelton v. Dill*, 235 U. S. 206-208.

Under the Creek Agreement of March 1, 1901, § 3, it was permissible for the Dawes Commission to enroll tribal citizens and make them allotments when they failed to make selections for themselves.

Affirmed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Kearful, with whom *The Solicitor General* and *Mr. S. W. Williams* were on the brief, for the United States.

Mr. Joseph C. Stone, *Mr. John J. Shea* and *Mr. C. B. Stuart* for *Wildcat et al.* The following counsel were on the brief: *Mr. A. C. Cruce*, *Mr. Geo. S. Ramsey*, *Mr. Malcolm E. Rosser*, *Mr. Edgar A. de Meules*, *Mr. Villard Martin*, *Mr. John Devereux*, *Mr. J. E. Wyand*, *Mr. K. B. Turner*, *Mr. M. E. Turner*, *Mr. J. B. Furry*, *Mr. E. C. Motter*, *Mr. P. J. Carey*, *Mr. W. C. Franklin*, *Mr. Burdette Blue*, *Mr. Thomas F. Shea*, *Mr. William A. Collier*, *Mr. Hazen Green*, *Mr. E. J. Van Court*, *Mr. Chas. A. Moon* and *Mr. Francis Stewart*.

Mr. A. A. Davidson, with whom *Mr. Preston C. West* and *Mr. James A. Veasey* were on the brief, for *Bissett et al.*

Mr. R. C. Allen and *Mr. James C. Davis*, by leave of court, filed a brief on behalf of the Creek Nation as *amici curiæ*.

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Mr. Grant Foreman and *Mr. James D. Simms*, by leave of court, filed a brief as *amici curiæ*.

MR. JUSTICE DAY delivered the opinion of the court.

This action was begun by the United States, in behalf of the Creek Tribe of Indians, in the District Court of the United States for the Eastern District of Oklahoma, against Bessie Wildcat, and others, heirs of Barney Thlocco, a full-blood Creek Indian, to obtain cancellation of the allotment certificate and deeds for his allotment of 160 acres. The bill of complaint alleges that Thlocco was a Creek Indian by blood; that he died at about the beginning of the year 1899 and prior to April 1, 1899, and that he was not entitled to be enrolled as a citizen of the Creek Nation or to receive an allotment of any part of its lands under the acts of Congress; that on or about May 24, 1901, the Commission to the Five Civilized Tribes caused his name to be placed on the roll of Creek citizens by blood which that Commission was then preparing; that thereafter, on June 30, 1902, the Commission issued a certificate of allotment in Thlocco's name, and homestead and allotment patents purporting to convey the land allotted were executed by the Principal Chief of the Creek Nation on March 11, 1903, and approved by the Secretary of the Interior on April 3, 1903; that thereafter, on December 13, 1906, the Secretary of the Interior, by executive order, caused Thlocco's name to be stricken from the roll of citizens by blood of the Creek Nation, and he is not an enrolled citizen by blood or otherwise of the Creek Nation, and is not now and has never been entitled to an allotment of land therein because he has never been a lawfully enrolled citizen thereof, and because he died prior to April 1, 1899; and that the patents have never been delivered to Thlocco or to any other person, but are in the possession of complainant through its officers and agents. The bill

alleges that these instruments and proceedings constitute a cloud upon the Creek Nation's title to the land and that the existence of this cloud hinders and delays complainant in the performance of the duty imposed on it by law to allot and otherwise dispose of the lands and to wind up the affairs of the Creek Nation, and prays that the allotment certificate and patents be declared void and of no effect as instruments of conveyance; that the defendants be decreed to have no right, title, interest or estate in and to the land; that the title to the land be quieted in complainant and the Creek Nation; that whatever cloud is cast upon the title to the land by reason of the matters aforesaid be decreed to be dissolved and the land decreed to be a part of the public and unallotted tribal land of the Creek Nation, subject to disposition by complainant in accordance with law; that the enrollment of Barney Thlocco be cancelled, and that he, or any person claiming by, through, or under him, including the defendants, be decreed not to be entitled to participate in the disposition of the lands, moneys, or other property of the Creek Nation, and that the defendants be forever enjoined from asserting any claim of title to, or interest in the tract of land hereinbefore described, adverse to the complainant and the Creek Nation. It is alleged that no hearing was held or investigation made by the Commission and no evidence of any kind was obtained or had by it on the question of Thlocco's right to be enrolled; that no notice was given to the Creek Nation that his name was about to be enrolled; that there was no controversy, contest or adverse proceeding of any kind before the Commission in this respect; and that the Commission, in causing Thlocco's name to be placed on the roll of Creek citizens by blood, acted arbitrarily and summarily, and without knowledge, information or belief that he was living or dead on April 1, 1899, and acted on a mere arbitrary and erroneous assumption wholly unsupported by evidence or

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information that he was living on that date and entitled to be enrolled.

The answer avers that Thlocco was living April 1, 1899, and denies that the Commission acted arbitrarily and without evidence in placing his name on the roll and allotting the lands to him, and alleges that the Commission, in causing both these acts to be done, was not guilty of any gross mistake of fact or of law, but acted upon evidence satisfactory to it, and sufficient in law and in fact. It further alleges that the Dawes Commission was vested with jurisdiction to determine what persons were entitled to enrollment as citizens of the nation, and entitled to allotment out of the tribal lands, and that its decision in that regard having been approved by the Secretary of the Interior, "said enrollment, allotment and patent cannot be cancelled, nor can the issue of fact upon which the Commission placed the name of said Barney Thlocco upon the approved Creek roll be tried again, and these defendants say that this court is without authority of law or jurisdiction to reopen or retry the question of fact sought to be put in issue by the United States."

Other defendants claimed an interest in part of the same property under a subsequent allotment and intervened for the same relief as was asked by the United States.

Upon the trial of the case the Government offered to show by witnesses and circumstances that Thlocco in fact died in January, 1899. Upon objection to this evidence by the defendants, the trial court ruled that the question whether Thlocco was living on April 1, 1899, was one of the questions which the law submitted to the Dawes Commission, and that its decision, placing Thlocco's name on the tribal roll, could only be attacked upon the ground of fraud, error of law, or gross mistake of fact, or upon the ground that the Commission acted arbitrarily and wholly without evidence; that it was not open to the Govern-

ment, for the purpose of attacking the allotment certificate and deeds to Thlocco, to retry the question of fact as to whether he was living April 1, 1899.

At the conclusion of the trial the Government renewed its offer of proof, to which objections were sustained on the ground just stated. A decree was then entered dismissing the bill for the reason that the Government had failed to show that the Commission in enrolling Thlocco acted arbitrarily and without evidence. Appeal was then taken to the Circuit Court of Appeals for the Eighth Circuit, which court certified certain questions of law to this court. Subsequently a writ of certiorari was issued, bringing the whole case here. (Judicial Code, § 239.)

The Government in the brief filed in its behalf reduces the questions necessary to decide the merits of this appeal to two: First, Should the evidence offered by the Government to show that Thlocco died prior to April 1, 1899, have been admitted? Second, Should the judgment of the District Court be reversed because the enrollment of Thlocco and the allotment to him were made arbitrarily and without evidence as to whether he was living or dead on April 1, 1899?

As to the first question, an understanding of certain legislation is necessary to its answer. By the Act of Congress of June 10, 1896, 29 Stat. 339, the Commission to the Five Civilized Tribes, more commonly known as the Dawes Commission, was authorized to hear and determine applications for citizenship in any of the Five Civilized Tribes. By that act the rolls of citizenship of those tribes as they then existed were confirmed and the Commission commanded in determining applications for citizenship to "give due force and effect to the rolls, usages, and customs of each of said nations or tribes." It was provided by the Act of June 7, 1897, 30 Stat. 84, that the term "rolls of citizenship" should mean "the last authenticated rolls of each tribe which have been approved by

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the council of the nation, and the descendants of those appearing on such rolls," and certain others specified who had been lawfully added to the rolls. By the Curtis Act of June 28, 1898, 30 Stat. 495, 502, the Commission was authorized and directed to make correct rolls of the citizens by blood of the Creek Tribe, eliminating from the tribal rolls such names as might have been placed thereon by fraud or without authority of law, enrolling such only as might have lawful right thereto, and their descendants born since such rolls were made. It was provided that the Commission should make such rolls descriptive of the persons thereon, so that they might be identified thereby, and the Commission was authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls, with the right of access to all rolls and records of the several tribes, and with authority to administer oaths, examine witnesses, and send for persons and papers. The rolls so made, when approved by the Secretary of the Interior, were to be final, and the persons whose names were found thereon, with their descendants thereafter born to them, with such persons as might intermarry according to tribal laws, were alone to constitute the several tribes which they represented. By § 28 of the Creek Agreement of March 1, 1901, 31 Stat. 861, 870, it was provided that all citizens who were living on the first day of April, 1899, entitled to be enrolled under the above provisions of the Curtis Act, should be placed upon the rolls to be made by the Dawes Commission under that act, and provision was made for allotment to the heirs where any such citizen had died since that time. "The rolls so made by said commission," the act continues, "when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no

other persons." This agreement was ratified by the Creek Council May 25, 1901, 32 Stat. 1971.

The legislation which we have outlined indicates the purpose of Congress to make provision for the partition of the lands belonging to the Creek Nation among the members of the tribe, and to that end it authorized the Dawes Commission to make investigation and determine the names of such as were entitled to be on the rolls of citizenship and to participate in the division of the tribal lands. This purpose indicated in the Curtis Act of 1898 was emphasized by the so-called Creek Agreement of 1901, subsequently ratified by the tribe. In that act the Commission was authorized to investigate the subject, and its action when approved by the Secretary of the Interior was declared to be final. There was thus constituted a *quasi-judicial* tribunal whose judgments within the limits of its jurisdiction were only subject to attack for fraud or such mistake of law or fact as would justify the holding that its judgments were voidable. Congress by this legislation evidenced an intention to put an end to controversy by providing a tribunal before which those interested could be heard and the rolls authoritatively made up of those who were entitled to participate in the partition of the tribal lands. It was to the interest of all concerned that the beneficiaries of this division should be ascertained. To this end the Commission was established and endowed with authority to hear and determine the matter.

A correct conclusion was not necessary to the finality and binding character of its decisions. It may be that the Commission in acting upon the many cases before it made mistakes which are now impossible of correction. This might easily be so, for the Commission passed upon the rights of thousands claiming membership in the tribe and ascertained the rights of others who did not appear before it, upon the merits of whose standing the Commis-

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sion had to pass with the best information which it could obtain.

When the Commission proceeded in good faith to determine the matter and to act upon information before it, not arbitrarily, but according to its best judgment, we think it was the intention of the act that the matter, upon the approval of the Secretary, should be finally concluded and the rights of the parties forever settled, subject to such attacks as could successfully be made upon judgments of this character for fraud or mistake.

We cannot agree that the case is within the principles decided in *Scott v. McNeal*, 154 U. S. 34, and kindred cases, in which it has been held that in the absence of a subject-matter of jurisdiction an adjudication that there was such is not conclusive, and that a judgment based upon action without its proper subject being in existence is void. In *Scott v. McNeal* it was held that a probate court had no jurisdiction to appoint an administrator of a living person and to sell property in administration proceedings after finding that he was in fact dead. In that case it was held that a sale of the property of a living person by order of the probate court without notice to him necessarily deprived him of due process of law by selling his property without notice and by order of a court which had no jurisdiction over him in any manner. The notice in such cases to his next of kin, the court held, was not notice to him, and to make an order undertaking to deprive such person of his property would be to take it by a judgment to which the living person was not a party or privy; and it was held that jurisdiction did not arise from the mere finding of the court that the person whose property was thus taken was in fact deceased. In the present case the Government had jurisdiction over these lands. It had the authority to partition them among the members of the tribe. *Shulthis v. McDougal*, 170 Fed. Rep. 529, 534; *McDougal v. McKay*, 237 U. S. 372, 383.

For this purpose it determined to divide the lands among those living on April 1, 1899, and constituted a tribunal to investigate the question of membership and consequent right to share in the division. We think the decision of such tribunal, when not impeached for fraud or mistake, conclusive of the question of membership in the tribe, when followed, as was the case here, by the action of the Interior Department confirming the allotment and ordering the patents conveying the lands, which were in fact issued. If decisions of this character may be subject to annulment in the manner in which the Government seeks to attack and set aside this one, many titles supposed to be secure would be divested many years after patents issued, upon showing that the decision was a mistaken one. The rule is that such decisions are presumably based upon proper showing, and that they must stand until overcome by full and convincing proof sufficient within the recognized principles of equity jurisdiction in cases of this character to invalidate them. *Maxwell Land-Grant Case*, 121 U. S. 325, 379, 381; *Colorado Coal & Iron Co. v. United States*, 123 U. S. 307.

As to the second contention, that the Commission acted arbitrarily and without evidence of the fact that Thlocco was living on April 1, 1899, there is no attack upon the finding of the Commission for fraud, and this record shows an earnest attempt to conform the rolls to the requirements of the law.

Thlocco's name appeared on the Tribal Rolls of 1890 and 1895 and on a census card made by a clerk of the Commission in 1897.

An enrolling clerk with the Dawes Commission testified that he entered the name of Barney Thlocco upon the census card on May 24, 1901; that at that time there were a great many names on the old rolls unaccounted for, and the party went to Okmulgee to get them to come out and get them enrolled; that a great many were brought in;

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that Thlocco was one of those who were unaccounted for at that time, and the witness could not say whether his name was taken from the old census roll or whether someone appeared and asked for his enrollment; that after Thlocco's name was listed there was some investigation upon the question as to whether or not he was living or dead on April 1, 1899, but the Commission would have to be satisfied or have information of some kind that he was living on that date; that the Commission knew that Thlocco was dead in 1901 and it apparently was satisfied that he was living on April 1, 1899; that they would ask town kings and town warriors when they came in and anybody else if they knew this or that about the applicants; that because of a discrepancy between the ages of Thlocco on the census cards they must have had some information other than the old census card; that the invariable custom and practice was never to fill out one of the cards until they had some information from some source with reference to the question as to whether the applicant was living or whether he had died prior to April 1, 1899; that the Commission never arbitrarily listed any name; that no name was listed solely because it was on the Roll of 1895, but some particular individual evidence was required outside of that roll; that before the new rolls were sent to Washington the clerks and the chairman of the Commission would get together and go over every one of them.

The clerk who made out the census card in 1897 testified that as Chief Clerk of the Commission he helped in the enrollment; that a notation on the census card "died in 1900" was in his handwriting, but that he did not know who had given him the information or what use was made of the notation, except that it was intended that when the Commission came to pass on that name for final record on the roll an inquiry should be made as to when Thlocco died or whether he was dead and get the proper affidavit

and death proof; that the Commission did not arbitrarily enroll any Creek citizen without evidence, and that in every single case if the applicant did not appear some one who was regarded as reliable appeared for him and gave evidence until the Commissioner was satisfied that he belonged on the roll; that whenever any question was raised by the Creek Nation or its attorney with reference to the right to enrollment, or for any reason as to whether the applicant was living or dead, there was generally testimony taken in those cases; that with reference to those people whose names up to March, 1901, had not been accounted for, there were lists of these made and sent to the various town kings and various inquiries were made that way and report came back; that sometimes the party addressed came in and gave verbal testimony, and if it seemed clear to the Commission it was probably not reduced to writing; that if there was any question with reference to the matter it probably was reduced to writing; that the Commission had to be satisfied from the records; that the Commission never passed upon a card until it was completed; that the information may have been picked up piecemeal over a year or two, but the Commission was satisfied that the party was entitled to enrollment, and the records were made up for the purpose of the information of the Commission and to show such information as was necessary to enable the Commission to reach a decision.

One of the enrolling clerks at Okmulgee testified that if information was present that a name was entitled to go on the rolls, the roll was completed at Okmulgee; that if the Commission did not have this information they did not complete it; that the fact that Barney Thlocco's card was completed at Okmulgee indicated that the party who wrote the card was satisfied that Thlocco was living on April 1, 1899, and satisfied from evidence; that there was in all cases some evidence as to whether the citizen

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was living or dead on April 1, 1899, before the rolls were recommended to the Secretary of the Interior.

The Acting Chairman of the Dawes Commission testified that they did not to his knowledge ever enroll any man without taking some evidence, information, or eliciting knowledge from some source other than the tribal rolls that he was entitled to be enrolled, and it was never permitted to be done; that the purpose was to find out whether a man was entitled to enrollment and one of the factors in that determination was whether he died prior or subsequent to April 1, 1899; that he always ascertained that fact before he enrolled the applicant and always satisfied his mind on that subject by evidence outside of the roll; that every name sent into the Department of the Interior as a name to be enrolled and which had been enrolled as a member of the Creek Tribe had been investigated by some member of the Commission at some place and by evidence outside of the rolls and a determination had been reached that that person was entitled to enrollment; that he undoubtedly satisfied himself from an examination of Thlocco's card whether Thlocco was living on April 1, 1899; that in securing information the Commission had the assistance of the best men in the tribes as well as its own field parties; that when he would take the card he would have the card and the clerk would have the schedule, and he went over it several times with clerks and would find out from the clerk all the information the clerk had with reference to that card several times.

It is true, as set forth in the certificate upon which this case was originally sent here, in view of § 28 of the original Creek Agreement, providing that no person except as therein provided should be added to the rolls of citizenship of the tribe after the date of the agreement, and no person whomsoever should be added to the rolls after the ratification of the agreement, which was ratified on May 25, 1901, that the tribe assembled at Okmulgee,

its capital, some days before that date, for the purpose of considering and acting upon the agreement, and that there was great activity some time before the ratification upon the part of the Dawes Commission and its officers and clerks to complete the enrollment of the tribe; and it is shown that Thlocco's enrollment card was made out at Okmulgee on the twenty-fourth day of May, 1901,—the last day before the ratification of the agreement. It is also true that in the testimony as adduced in this record, there was, as naturally would be the case, a lack of recollection as to the details which attended the enrollment of Thlocco. But there is evidence to which we have already alluded, showing the practice of the Commission to make inquiries and investigations and to ascertain the facts as to the persons enrolled, and that no person was enrolled without information that was deemed satisfactory at that time. The Commission had before it the tribal rolls of 1890 and 1895. The latter roll was made out some six years before the action of the Commission, and in the absence of proof of Thlocco's death or some circumstances to give rise to the conclusion that he was not still living, the Commission might well indulge the presumption that he was still alive. *Fidelity Mutual Life Assn. v. Mettler*, 185 U. S. 308, 316.

It is true that the methods followed by the Commission may not have been the most satisfactory possible of determining who were entitled to enrollment as living persons on April 1, 1899, but it must be remembered that there were many persons whose right to enrollment was being considered, and the Commission in good faith made an honest endeavor to keep the names of persons off the rolls who were not entitled to appear as members of the tribe upon the date fixed by Congress. We think the testimony very far from showing such arbitrary action on the part of the Commission in placing Thlocco's name on the rolls as would establish that mistake of law or fact

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which is essential to the impeachment of the action of the Commission. This action was brought fourteen years after the enrollment of Thlocco and the allotment to him based on such enrollment should not be disturbed except for good and sufficient reasons.

It is not contended by the Government that the subsequent action of the Secretary in striking Thlocco's name from the rolls had the legal effect to accomplish that purpose. Such is the contention of the intervenors. The testimony shows that Thlocco was enrolled by the Commission on May 24, 1901, that the allotment was made and the certificate therefor issued on June 30, 1902, and that patents were recorded in the office of the Commission on April 11, 1903, the allotment certificate issued in the name of Thlocco. On August 25, 1904, the Commission transmitted to the Secretary of the Interior a communication from the Creek attorney in the nature of a motion to re-open the matter. On September 16, 1904, the Secretary of the Interior ordered further investigation, and directed that notice be given to the heirs of Thlocco of the hearing. The heirs of Thlocco were not found, and no notice was given them of the proposed hearing. On October 10, 1906, the Commission reported that the testimony showed that Thlocco died before April 1, 1899, and recommended that his name be stricken from the roll. On December 13, 1906, the Secretary directed that Thlocco's name be stricken from the roll, and requested the Attorney General to take action to set aside the allotment deeds. We think this action entirely ineffectual to annul the previous action of the Government in placing Thlocco's name upon the roll and issuing in his name the certificate and patents as we have stated. Such action could not be legally taken without notice to the heirs, and was void and of no effect. *Garfield v. United States ex rel. Goldsby*, 211 U. S. 249; *Knapp v. Alexander-Edgar Lumber Co.*, 237 U. S. 162, 169. In *Lowe v. Fisher*, 223

U. S. 95, the Secretary of the Interior in striking names from the roll of Cherokee citizens acted after notice and opportunity to be heard.

The fact that Thlocco was dead at the time deeds were issued in his name would not prevent the title from vesting in his heirs. Section 28 of the Act of March 1, 1901, 31 Stat. 861, 870, provides that "if any such citizen has died since that time [April 1, 1899,] or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly." The effect of this provision is to vest title in the heirs by operation of law. *Skelton v. Dill*, 235 U. S. 206, 207, 208.

As to the contention that the lands were not selected by Thlocco, and that he was one of those arbitrarily placed upon the rolls, we think it was within the authority of the Commission to enroll members of the tribe who for any reason refused to make selections; for the statute (§ 3, 31 Stat. 861, 862) provides that "all lands of the said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said commission so as to give each an equal share of the whole in value, as nearly as may be, in the manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him." While citizens were thus permitted to make their selections for the purpose of retaining improvements, it seems clear that in case any citizen failed to avail himself of this right it was permissible for the Commission to make the allotment.

We think the District Court rightly ruled that the Government had not offered evidence competent to im-

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Counsel for Plaintiff in Error.

peach the validity of the Commission's action and thus to invalidate the title subsequently conveyed by the patent to Thlocco with the approval of the Interior Department.

It follows that the decree of the District Court, dismissing the bill, should be

Affirmed.

MR. JUSTICE McREYNOLDS took no part in the consideration or decision of this case.